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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

M/V IKAN SELAYANG, her engines, boilers, etc.,
and FEDNAV LIMITED,

Petitioners,

—v.—

SOGEM-AFRIMET, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF M/V IKAN SELAYANG AND FEDNAV LIMITED FOR WRIT OF CERTIORARI

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83 pp.

QUESTION PRESENTED FOR REVIEW

Does the U.S. Carriage of Goods by Sea Act prohibit an ocean carrier from relying on the certification by an independent inspector appointed by the cargo owner that the designated cargo hold is "fit and suitable" for the ocean carriage of the particular cargo?

LIST OF PARTIES AND RULE 29.1 LIST

Respondent Sogem-Afrimet, Inc., plaintiff-appellee below, is a wholly-owned subsidiary of Sogem-Afrimet, S.A., a privately held Belgian corporation.

Petitioner M/V IKAN SELAYANG was a Singapore flag vessel owned by claimant Selayang Shipping Pte. Ltd., a Singapore corporation and a subsidiary of Pacific Carriers Pte. Ltd.

Petitioner Fednav Limited is a privately held Canadian company with no public parents, affiliates or subsidiaries.

Pacific Carriers Pte., Ltd., not a party to this petition, is a Singapore company which is publicly held.

Chrisholm Trading Pte., Ltd., not a party to this petition, was a subsidiary of Pacific Carriers Pte., Ltd.

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M/V IKAN SELAYANG and Fednav Limited respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in order to resolve a conflict between the Second and Fifth Circuits and the Ninth Circuit and thereby establish a uniform method of interpreting and applying an important maritime statute.

OPINIONS BELOW

The summary order and mandate of the Court of Appeals for the Second Circuit dated September 15, 1997 affirming

the district court's judgment is set forth at Appendix 1a-4a (hereinafter "App. __a"). The Opinion, Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of New York dated December 20, 1996 in favor of respondent Sogem-Afrimet, Inc. is reported at 951 F. Supp. 429 and is reprinted at App. 5a-35a. The judgment entered thereon on December 24, 1996 is reprinted at App. 36a and 37a and the corrected judgment entered on October 4, 1997 is reprinted at App. 38a and 39a.

JURISDICTION

Petitioners seek review of the summary order of the Court of Appeals for the Second Circuit dated September 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Sections 1300 through 1304 of the United States Carriage of Goods by Sea Act, 1936), 46 U.S.C. app. §§ 1300-1315 (1997) (hereinafter "COGSA") are set forth at App. 40a-47a.

STATEMENT OF THE CASE

On November 3, 1993, plaintiff-respondent Sogem Afrimet, Inc. (hereinafter "Sogem" or "plaintiff") filed a complaint against defendants-petitioners M/V IKAN SELAYANG, her engines, tackle, apparel, *in rem*, and Fednav Limited and defendants Chrisholm Trading Pte. Ltd. and Pacific Carriers Pte. Ltd., *in personam*, in the United States District Court for the Southern District of New York under the admiralty and maritime jurisdiction of that court, 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. The complaint alleged money damages in the amount of $316,645.38 for contamination damage to a bulk shipment of zircon sand

carried under an ocean bill of lading dated September 17, 1991 from Brisbane, Australia to Brownsville, Texas, pursuant to a charter party between Sogem and Fednav Limited dated July 23, 1991.

The action was tried without a jury before The Hon. Bernard Newman[1] on September 4, 5, and 9, 1996. In its decision dated December 20, 1996, the district court awarded Sogem $270,161.49 representing the loss in value caused by contamination of the cargo of zircon sand by rust particles which originated in the cargo hold of the M/V IKAN SELAYANG. The district court dismissed plaintiff's claims against Chrisholm Trading Pte., Ltd. and Pacific Carriers Pte., Ltd. The district court deduced that the rust that contaminated the zircon sand was hard scale rust[2] that was loosened from the upper reaches of the vessel's No. 6 cargo hold by vibrations and by a clam shell bucket that "may have" struck a bulkhead during an earlier port call at Wilmington, North Carolina where approximately 3,400 metric tons were unremarkably discharged from No. 6 hold. Generic "red primer paint" subsequently found on some rust also implicated the vessel as the source. App. 23a and 24a. The district court concluded that

> [d]efendant could have prevented the risk of rust falling into plaintiff's cargo but did not and therefore cannot be said to have exercised due diligence.

App. 28a.

Judgment was entered on December 24, 1996. Petitioners then appealed to the United States Court of Appeals for the

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[1] Senior Judge, United States Court of International Trade, sitting by designation.

[2] Even though the eyewitnesses, the master, chief officer and charterer's inspector, saw no problematic rust (App. 48a and 55a), the district court found that there was rust relying on the expert "assumption" of Mr. Alder at trial who had never seen the ship. App. 49a.

Second Circuit. In a summary order dated September 15, 1997, the court of appeals affirmed the district court's decision.

This petition involves the interpretation of four provisions of COGSA (§§ 1302, 1303(1), 1303(8) and 1304(2)(i)) as applied to a common maritime contract.

Clause 35 of the charter, entered into by Fednav, as vessel owner, and Sogem, as charterer, incorporated COGSA through a short-hand expression, "U.S.A. Clause Paramount." App. 54a. Fednav agreed to provide space aboard the M/V IKAN SELAYANG for maximum 4,200 metric tons of zircon sand for carriage from Brisbane, Australia to two U.S. discharge ports designated by Sogem as Wilmington, North Carolina and Brownsville, Texas. The charter, dated July 23, 1991, also provided, in pertinent part, as follows:

> 10. Cargo shall be loaded, spout/grab trimmed and discharged at the risk and expense of the Charterer by stevedores nominated, employed and paid by Charterer . . . .

App. 53a.

* * *

> 38. All holds, decks and stanchions are to be swept and cleaned suitable for this cargo before vessel tenders for loading. Owners to have vessel passed by Charterer's representative as clean and ready to load cargo prior to tender . . . . (It is understood that the vessel cannot tender Notice of Readiness until passed.)

App. 54a.

On August 16, 1991, the master of the vessel, then in Pusan, Korea, reported by telefax to Fednav that the condition of No. 6 hold was "not so good" in anticipation of loading Sogem's cargo. App. 57a. The vessel thereafter proceeded

southward and stopped at Masinloc, Republic of the Philippines where a shore gang was hired and worked to clean the vessel's No. 6 hold. App. 11a.

En route to Australia, the crew of M/V IKAN SELAYANG continued to "chip and scrape" the surfaces of No. 6 hold in preparation for loading zircon sand. The chief officer of the M/V IKAN SELAYANG, Zbigniew Stasiak, testified that he inspected the No. 6 hold and found no hard scale rust, no loose rust, and no paint chips and concluded that the condition of the hold was "very good." App. 48a. Upon arrival at the loadport of Brisbane, Australia on September 17, 1991, Michael Pearson, an independent surveyor appointed on behalf of Sogem, inspected the vessel's Nos. 3 and 6 holds and certified each of the holds to be "fit and suitable" for the transport of mineral sands. App. 55a. The requirements of clause 38 of the charter party were thus fulfilled. The charterer commenced to load the vessel pursuant to clause 10 of the charter party. Pearson testified later that the vessel had exercised due diligence to make the hold fit. App. 48a. The vessel sailed from Brisbane, Australia on September 18, 1991.

Petitioners' defense at trial was *inter alia* that the testimony of the vessel's chief officer describing the efforts to prepare No. 6 hold coupled with Pearson's written approval and testimony that the crew had been diligent proved that the carrier had satisfied its obligations under Section 1303(1)(c), COGSA, to make the hold fit and safe. Despite clear error by the district court in ruling against petitioners, the court of appeals affirmed this finding without comment.

Of the 4,200 metric tons loaded into hold No. 6 at Brisbane, approximately 3,400 tons were discharged at Wilmington, North Carolina. There were no complaints regarding the condition of any of the zircon sand discharged uneventfully at Wilmington. App. 14a. On November 6, 1991, Sogem discharged the balance of the zircon sand from No. 6 hold at Brownsville, Texas. The discharge was observed by the

product manager of Sogem. The zircon sand looked "okay." App. 50a. The district court opinion does not mention this testimony or that of two other eyewitnesses present at the discharge. App. 48a and 51a. The district court opinion also does not mention Sogem's independent laboratory analysis that the rust and other contaminants were not of shipboard origin. App. 56a.

For purposes of this petition, the Court may assume, as the district court found, that the rust originated on the vessel. The legal issue squarely presented is whether the charterer's inspector's approval of the fitness of the hold exonerates the ocean carrier.

REASONS FOR GRANTING THE WRIT

This case presents in clear form the important question arising under federal law and within admiralty whether the provisions of section 1303 of COGSA should be interpreted as superior or equal to the provisions of section 1304. This case is an excellent vehicle for this Court's review under Rule 10(c) because it does not involve conduct but, rather, judgment, *i.e.*, the opinion of the cargo owner's inspector that the cargo hold was fit.

I. STATUTORY FRAMEWORK

Section 1302 of COGSA exposes the ocean carrier "in relation to the loading, handling, stowage, carriage, custody, care and discharge" of goods to the "responsibilities and liabilities" and "rights and immunities set forth in Sections 1303 and 1304 . . . ." Relevant to the facts of this case is the obligation imposed by section 1303(1)(c) "to exercise due diligence" before and at the beginning of a voyage to make the cargo hold "fit and safe" for the "reception, carriage and preservation" of cargo. Section 1303(2) imposes upon the carrier the affirmative obligation to "properly and carefully load,

handle, stow, carry, keep, care for and discharge the goods . . . ."

Section 1303(8) provides that:

> any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage arising from negligence, fault or failure in the duties and obligations provided in this section or lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect . . . .

Section 1304(2)(i) provides that the carrier shall not be responsible for loss or damage arising from "[a]ct or omission of the shipper or owner of the goods, his agent or representative."

II. JUDICIAL INTERPRETATION

A. STATUTORY INTERPRETATION BY SECOND CIRCUIT

Notwithstanding the provisions of section 1302 which establish an equality of the affirmative obligations imposed by section 1303 and the affirmative defenses prescribed by section 1304, the Second Circuit Court of Appeals has held for twenty-five years that the affirmative obligations prescribed by section 1303 are "non-delegable" notwithstanding that the shipper or owner of goods has undertaken tasks[3] described in section 1303. In affirming the district court, the

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[3] Contracts of carriage often include "free in, out" ("FIO") language, similar to clause 10 of the IKAN SELAYANG charter. App. 53a. This is a "common and commercially acceptable practice" which places the costs and responsibility for loading and discharging on the cargo owner. *Atlas Assurance Co., Ltd. v. Harper, Robinson Ship. Co.*, 508 F.2d 1381, 1389 (9th Cir. 1975). Thus, the carrier provides "transportation services only" but not stevedoring services. *Waterman Steamship Corp. v. United States*, 595 F.2d 91, 92 (2d Cir. 1978).

Court of Appeals for the Second Circuit followed a line of cases that posit that duties imposed on an ocean carrier by sections 1303(1) and (2) of COGSA are "non-delegable." *Nichimen Company v. M.V. FARLAND*, 462 F.2d 319, 330 (2d Cir. 1972); *Dempsey & Associates, Inc. v. S.S. SEA STAR*, 461 F.2d 1009, 1014-15 (2d Cir. 1972) and *Associated Metals & Minerals v. M/V ARKTIS SKY*, 978 F.2d 47, 50 (2d Cir. 1992). *See also Blommer Chocolate Co. v. Nosira Sharon Ltd.*, 776 F. Supp. 760, 776 (S.D.N.Y. 1991), *aff'd without opinion*, 963 F.2d 1552 (2d Cir. 1992).

The Second Circuit reasoned in *Associated Metals v. M/V ARKTIS SKY*, 978 F.2d at 50, that:

> The plain language of Section 1303(8) forbids enforcement of agreements to relieve carriers of liability for negligence in carrying out the duties set forth in Section 3 of COGSA.

The court rejected the carrier's argument that the phrase "otherwise than as provided in this chapter" in Section 1303(8) permitted a shipper or owner of the goods to undertake and be responsible for one or more of the tasks described in Section 1303 by reasoning that the quoted language only

> modifies the damage limitation ("lessening such liability") set forth in COGSA, which provides a $500 per package ceiling on damages. *See* 46 U.S.C. app. § 1304(5). The phrase does not affect the statute's prohibition on agreements relieving carriers of liability for negligence in carrying out their duties under the Act.

Id. Specifically, the court held that an FIOS clause "is 'null and void' under the statute because it purports to relieve a carrier of liability for negligence in one of its duties, the stowing of cargo." *Id.*

The issue that petitioners request this Court to consider is whether the Second Circuit Court of Appeals reads the statute correctly in according Sections 1303(1) and (2) dominance.

Narrowly stated, the issue is whether the court of appeals is correct when it interprets the statute's word "chapter" to mean only one sub-section.[4]

B. STATUTORY INTERPRETATION BY FIFTH CIRCUIT

In *Tubacex, Inc. v. M/V RISAN*, 45 F.3d 951, 956 (5th Cir. 1995), the Court of Appeals for the Fifth Circuit agreed with the analysis of the Second Circuit in *M/V ARKTIS SKY* that Section 1303(8) bars "a provision in the bill of lading shifting liability for the duties set out in Section 1303(2) . . . ." Nevertheless, the court affirmed the district court's granting summary judgment in favor of the carrier because the cargo damage was caused by stevedores employed by the cargo owner. The affirmative defenses afforded by sections 1304(2)(i) and (q) were enforced.

C. STATUTORY INTERPRETATION BY NINTH CIRCUIT

In *Atlas Assurance Co., Ltd. v. Harper, Robinson Ship. Co.*, 508 F.2d 1381 (9th Cir. 1975), shipper Sterling voyage-chartered a vessel from Cargill on "FIO" terms and placed marine cargo insurance "to order" with Atlas. Sterling's stevedore loaded the cargo. Sterling sold the cargo to the consignee and conveyed the ocean bill of lading and insurance certificate. The consignee made a claim for damage caused during loading against Atlas the insurer, which Atlas paid. As a subrogee, Atlas sued the carrier Cargill which impleaded Sterling for indemnity based on the FIO charter. Sterling then claimed against Atlas for indemnity under the insurance policy. In resolving the dispute between Sterling and Atlas, the court

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[4] Statutory construction begins with the language of the act. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (*citing Blue Chips Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

observed that Atlas's subrogation rights against Cargill were modified by the FIO charter:

> Although the consequence of this is to deprive Atlas of the COGSA bill of lading presumptions against Cargill, this is only to say that Cargill is not liable for what it has not done, *viz.*, stevedoring. *See* Carriage of Goods by Sea Act, 46 U.S.C.A. 1300, *et seq.*

Id. at 1389. The court thereby permitted a delegation by the carrier of its duty to load and stow.[5]

D. STATUTORY INTERPRETATION BY DISTRICT COURTS

This difference of interpretation among the circuits manifests itself much more energetically in the district courts which have considered the issue.

In *Sumitomo Corporation of America v. M/V SIE KIM*, 632 F. Supp. 824 (S.D.N.Y. 1985), the contract of carriage provided that cargo was to be loaded and stowed by the shipper and discharged by the carrier ("Free in, Liner out" ("FILO")). The district court rejected the cargo plaintiff's argument that the carrier was responsible for the manner in which the cargo was stowed by the shipper dismissing the *Nichimen* and *Dempsey* "non-delegable" duty discussions as "somewhat casual dicta." *Id.* at 836. In analyzing the provisions of COGSA, the district court reconciled them in terms of "control" rather than "non-delegability." *Id.* at 837.

In *Sigri Carbon Corp. v. Lykes Bros. S.S. Co., Inc.*, 655 F. Supp. 1435 (W.D. Ky. 1987), the cargo was shipped "free in/out stowed" ("FIOS"). The court rejected all of the precedents which speak of non-delegability because the courts that had asserted the doctrine offered "neither authority nor

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[5] Hegarty, A COGSA Carrier's Duty to Load and Stow Cargo Is Nondelegable, Or Is It? *Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 18 Tulane Mar. L.J. 125, 130 (1993).

analysis." Relying on *Sumitomo Corp. of America v. M/V SIE KIM*, 632 F. Supp. 824, William Tetley, *Marine Cargo Claims* 264 (2d ed. 1978) and 2A *Benedict on Admiralty* § 94 (6th ed. 1977), the district court embraced the tenet that "control" should be the operative word.

The district court in *Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 1992 AMC 1217 (S.D.N.Y. 1992) (not officially reported), *rev'd* 978 F.2d 47 (2d Cir. 1992) considered the cargo plaintiff's contention that cargo damaged during loading by the stevedores engaged by the shipper under an FIOS contract was, nonetheless, the responsibility of the carrier. The district court weighed the *dicta* in *Nichimen* and *Dempsey* against the logical analysis in *Sigri* and *Sumitomo* and held:

> Accordingly, the Court adopts their conclusion that a carrier's duty to properly and carefully load and stow cargo under § 1303(2) is not genuinely non-delegable, and holds that a carrier is not responsible for the consequences of improper stowage performed by agents of the shipper pursuant to an FIOS bill of lading. This is not to say that the carrier is exonerated for its own acts of negligence. Rather, the carrier is liable *solely* for its negligence, and not the negligence of parties not in its control.

Id. at 1225.

Of course, the Second Circuit reversed but, in so doing, failed to account for the simple fact that its result makes the carrier an insurer of the shipper's acts, omissions or negligence, a result not intended by the statute.[6]

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[6] Grant Gilmore & Charles L. Black, Jr., *Law of Admiralty* 150 (2d ed. 1975) [hereinafter Gilmore & Black], ("[T]he carrier's insurer's liability is a thing of the past.")

E. DISCUSSION BY SUPREME COURT

The impetus for this petition is this Court's treatment of the issue *obiter dictum* in *Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995). The cargo owner attempted to avoid enforcement of a forum selection clause in the contract of carriage requiring arbitration at Tokyo by arguing that the Japanese version of the Hague Rules does not impose on the carrier the non-delegable obligation to properly and carefully stow the goods as articulated in *Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 978 F.2d 47 (2d Cir. 1992). This Court countered this substantive legal argument as follows:

> But see COGSA § 4(2)(i), 46 U.S.C. § 1304(2)(i) ("[N]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . [a]ct or omission of the shipper or owner of the goods, his agent or representative"); COGSA § 3(8), 46 U.S.C. App. § 1303(8) (agreement may not relieve or lessen liability "otherwise than as provided in this chapter"); *Hegarty, A COGSA Carrier's Duty To Load and Stow Cargo Is Non-Delegable, Or Is It?: Associated Metals & Minerals v. M/V ARKTIS SKY*, 18 Tulane Mar. L. J. 125 (1993).
>
> Whatever the merits of petitioner's comparative reading of COGSA and its Japanese counterpart, its claim is premature . . . .

Vimar Seguros Y Reaseguros, S.A. v. M/V SKY REEFER, 515 U.S. at 539-40. The facts of the case at bar are ripe for resolution of this issue.

III. IMPORTANCE OF THE ISSUE

The misinterpretation by the Second Circuit Court of Appeals of the duties and defenses set forth in COGSA places upon all ocean carriers more than mere burdens in respect of "FIO" contracts of carriage in maritime commerce wherein the cargo owner furnishes stevedores to load and to discharge

the cargo. The unfairness of the interpretation lies in the fact that the carrier is held responsible for that which he did not agree to do, did not do, did not pay for, received no benefit from and did not control. Practically speaking, the master of a vessel bound to an "FIO" contract has little supervisory control over how the cargo is prepared for loading, loaded, and/or discharged. Typically, his control is limited to matters affecting the stability and seaworthiness of the vessel. When a cargo owner undertakes to perform tasks for his own account and relieves the ocean carrier of making the necessary arrangements, the cargo owner does so freely and for its own purposes, whether cost saving, discretion to appoint familiar stevedores or simply control over the processes. This allocation of responsibilities is negotiated and agreed to by commercial people who share the common interest of transporting cargo safely and economically.

The interpretation of COGSA which the Second Circuit Court of Appeals has forced upon the maritime community impairs such contractual agreements and unjustifiably increases carriers' exposure to liability for matters not within their control. For example, Sogem and Fednav had entrusted pertinent decision-making authority to the master and the inspector. The master opened No. 6 hold to Sogem's inspector at Brisbane for the inspector to determine whether the efforts by the carrier in preparing the cargo hold for zircon sand were sufficient. The cargo owner has knowledge about the idiosyncrasies of its cargo far superior to the general knowledge of the master. *See Caemint Food, Inc. v. Lloyd Brasileiro*, 647 F.2d 347, 354 (2d Cir. 1981). Under the terms of clause 38 of the charter, the master was unable to tender notice of readiness until after the cargo hold had been passed by the charterer's inspector. In charter party terms, this meant that the time waiting for the vessel to pass inspection was for the carrier's account.[7] If the hold did not pass inspection,

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[7] *See generally*, Gilmore & Black, *supra* note 6, at 210; *Scrutton on Charterparties*, 143-44 (18th Ed. 1974); Julian Cooke, Timothy

the vessel would have been required to correct whatever deficiencies were noted. Clause 38 of the contract gives the charterer's inspector absolute discretion—a veto power. The master has no recourse to any other arbiter. But here, charterer's inspector inspected No. 6 hold and certified that it was "fit and suitable" to receive zircon sand. App. 55a.

The district court's retrospection more than five years after the vessel loaded at Brisbane that charterer's inspector's determination was "of no persuasive value" (App. 27a, fn. 11) ignores the exigencies of the moment. The master did not have such contemplative luxury. The charter explicitly provided that, once the hold is passed by the inspector, the loading process can begin. The hold had been cleaned, scraped and chipped to the satisfaction of the vessel's officers. Even if the master disregarded the charterer's inspector's opinion as "unpersuasive," what more was there for him to do? The master had already given the job his best effort. Contractually, he had no alternative but to allow the vessel to be loaded. And Sogem had a contractual expectation that its cargo would begin the voyage it bargained for. The parties placed confidence in their on-scene representatives to do a good job. The courts should not retroactively interfere in this commercially reasonable allocation of tasks.

In retrospect, the condition of the cargo hold was either fit or unfit when Pearson conducted his inspection. If it were in fact fit and Pearson so certified, then the carrier exercised due diligence to make it so.[8] If the hold were unfit, and Pearson certified it nonetheless, then the proximate cause of all that followed was the cargo owner's representative's decision to pass the vessel. Simply put, where the charterer's inspector

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Young, Andrew Taylor, John D. Kimball, David Martowski & LeRoy Lambert, *Voyage Charters* (1993), 589-590.

[8] "Examination and testing of the vessel" by a competent and experienced surveyor constitutes due diligence. *Margarine Verkaufsunion G.m.B.H. v. M.T.G.C. Brovig*, 318 F. Supp. 977 (S.D.N.Y. 1970) (Weinfeld, J.).

makes a mistake in certifying that the hold is fit to receive zircon sand, the vessel should not be held accountable for that mistake. At the very least, the carrier has been diligent in the eyes of the party to whom the duty was owed.

Petitioners do not contend that the carrier did not have the responsibility to do the work necessary to make the hold fit. The ocean carrier under the terms of the charter incorporating COGSA had the obligation to clean the vessel's No. 6 cargo hold to the satisfaction of the charterer's inspector. The time and expense necessary to satisfy the charterer's inspector were for the account of the carrier. If the charterer's inspector were not satisfied, the *vessel* would have had to do more. The issue is not, "Who is responsible to do the work?" Rather, the issue is, "Who decides when the work has been completed?" Sogem reserved that task for itself in clause 38. Since section 1304(2)(i) insulates the carrier from liability for acts of the shipper or owner of the goods, section 1303(8) should not be interpreted to render allocation of the inspection task "null and void" as the Second Circuit has.

Affirmative defenses grounded in the acts of the cargo owner or the cargo itself "arise out of considerations of simple justice and existed at common law."[9] The language of section 1304(2)(i) is noteworthy in that there is no fault component in the words "*act* or *omission* of shipper or owner of the goods, its agents or representatives." The section does not require an evaluation of the quality of the "act or omission," merely whether it occurred. Other courts have held cargo owners accountable for the decisions made by them relative to the conditions of shipment. In *Italusa Corporation v. M/V THALASSINI KYRA*, 733 F. Supp. 209, 217, *aff'd without opinion*, 916 F.2d 709 (2d Cir. 1990), the court held the cargo owner responsible for melted cheese where it had neither requested a refrigerated container nor given special

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[9] Gilmore & Black, *supra* note 6, at 167. *See also Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7, 23 (1859).

instructions to the carrier. In *Aunt Mid, Inc. v. Fjell-Oranje Lines*, 458 F.2d 712, 716 (7th Cir.), *cert. denied*, 409 U.S. 877 (1972), the shipper's decision to opt for ventilated rather than refrigerated stowage caused the loss for which the carrier was not liable. In *Bache v. Silver Line Limited*, 110 F.2d 60, 61-62 (2d Cir. 1940) (Hand, L., J.), the court discusses, in the context of packaging, the practical countervailing interests that form the natural tension between cargo owners and carriers which their contracts and the law must accommodate. In *Federal Insurance Co. v. Sabine Towing & Trans. Co.*, 783 F.2d 347, 350 (2d Cir. 1986), the court, under the rubric of "avoidable consequences," limited the liability of the carrier to only the test sample of bulk liquid cargo where the cargo owner's inspector had information that should have caused him to stop loading.

"Fitness" is a subjective term. *Martin v. The Southwark*, 191 U.S. 1, 9 (1903). What constitutes "clean" for a cargo of logs, railroad ties or coal is manifestly different than cleanliness for wheat, corn or household goods. Sogem's reservation of a veto power in clause 38 permits Sogem to bring its special knowledge to bear in deciding whether the hold is clean enough for bulk zircon sand. The charterer is not required to nor expected to judge the water tight integrity of the vessel or her ability to weather wind and sea—just whether the hold was clean enough. The interpretation of COGSA by the Second Circuit Court of Appeals makes the ocean carrier an insurer of the acts or omissions of the owner of the cargo. In this case, the district court, in effect, concluded that the charterer's inspector did a bad job. App. 13A and 27a. Nevertheless, the court held that the carrier is responsible because COGSA does not permit the carrier to rely upon the judgment of its contract partner, the owner of the goods.

COGSA was intended to reduce the carrier's burden from a "warranty of seaworthiness" to an obligation of "due dili-

gence."[10] The decision of the district court as affirmed by the court of appeals not only effectively but also literally revived and reinstated a warranty component into the carrier's obligations under COGSA. The district court held:

> The law of the Second Circuit interpreting this provision is equally unambiguous, COGSA does not permit the carrier to divest itself of the duty to *insure* the proper stowage of the cargo.

App. 29a, (Emphasis added).

Earlier, the court wrote:

> Defendant could have prevented the risk of rust falling into plaintiff's cargo but did not and, therefore, cannot be said to have exercised due diligence.

App. 28a.

This is another way of expressing absolute liability. The district court effectively held that, because cargo was damaged, the carrier could not have exercised due diligence. Such reasoning vitiates many affirmative defenses in section 1304 which in all cases only become relevant *after* cargo is damaged.

Cargo owners and carriers are *de facto* partners in every ocean voyage with equal expectations of success. COGSA sets forth the duties, responsibilities and immunities. No consistent pattern of interpretation by the courts allows cargo owners and carriers to understand and anticipate where the line of responsibility will be drawn.

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10 Gilmore & Black, *supra* note 6, at 151.

CONCLUSION

For the reasons stated above, the petition should be granted.

Dated: New York, New York
December 9, 1997

CHRISTOPHER H. MANSUY
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 97-7108

Filed September 15, 1997

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15 day of September one thousand nine hundred and ninety-seven.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE JOSEPH M. MCLAUGHLIN,
Circuit Judges,

HONORABLE DAVID G. TRAGER,
District Judge*.

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* Honorable David G. Trager, of the United States District Court for the Eastern District of New York, sitting by designation.

SOGEM-AFRIMET INC.,

Plaintiff-Appellee,

—v.—

M/V IKAN SELAYANG, her engines, tackle, apparel, in rem, CHRISHOLM TRADING PTE. LTD, PACIFIC CARRIERS PTE. LTD., FEDNAV LIMITED, in personam,

Defendants-Appellants,

SELAYANG SHIPPING PTE. LTD.,

Claimant.

Appearing for Appellant: Christopher H. Mansuy, Walker & Corsa, N.Y., N.Y.

Appearing for Appellees: John T. Lillis, Jr., Kennedy, Lillis, Schmidt & English, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendants M/V Ikan Selayang ("Ikan"), *et al.*, appeal from a judgment entered in the United States District Court for the Southern District of New York following a bench trial before

Bernard Newman, Judge of the United States Court of International Trade, sitting by designation, awarding plaintiff Sogem-Afrimet Inc. ("Sogem") damages under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. App. § 1300 *et seq.*, for contamination of Sogem's zircon sand during carriage aboard the Ikan. On appeal, defendants principally urge that we reverse the district court's liability finding by abandoning our longstanding adherence to the doctrine that duties imposed on a carrier by COGSA are nondelegable, *see generally Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 978 F.2d 47, 49-50 (2d Cir. 1992); *Nichimen Co. v. M.V. Farland*, 462 F.2d 319, 330 (2d Cir. 1972); *see also Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1014 (2d Cir 1972), and they contend that the district court erred in computing Sogem's damages. Finding no basis for reversal, we affirm.

We affirm the district court's liability ruling substantially for the reasons stated in Judge Newman's Opinion, Findings of Fact, and Conclusions of Law dated December 20, 1996. We decline defendants' invitation to revisit this Court's consistent application of the nondelegable-duty doctrine.

Defendants' strongest challenge to the district court's damages award concerns 191 metric tons of zircon sand as to which defendants contend Sogem failed to prove ownership. We are unpersuaded. The district court's findings of fact after a bench trial may not be set aside unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *McAllister v. United States*, 348 U.S. 19, 20 (1954). Assessments of the weight to be given to any piece of evidence fall squarely within the province of the factfinder, and where there are two permissible views of the evidence, and competing inferences could be drawn, "the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985); *see United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Although defendants contend that Sogem did not introduce an invoice indicating that it had paid Elf Atochem North America, Inc., for the 191 tons in question,

the record includes evidence that Sogem sold 130 tons of that sand for its own account and that it attempted to sell the remaining 61 tons. It also includes evidence that defendants had invoiced Sogem for freight with respect to the entire quantity of sand on board the vessel. In the circumstances, we cannot say that the district court clearly erred in implicitly finding that Sogem owned the 191 tons of sand.

We have considered all of defendants' contentions on this appeal and have found in them no basis for reversal. The judgment of the district court is affirmed.

/s/ AMALYA L. KEARSE
AMALYA L. KEARSE, U.S.C.J.

/s/ JOSEPH M. MCLAUGHLIN by ALK
JOSEPH M. MCLAUGHLIN, U.S.C.J.

/s/ DAVID G. TRAGER by ALK
DAVID G. TRAGER, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 7538 (BN)

SOGEM-AFRIMET, INC.,

Plaintiff,

v.

M/V IKAN SELAYANG, her engines, boilers, machinery, etc., *in rem,* FEDNAV LIMITED, PACIFIC CARRIERS PTE., LTD., and CHRISHOLM TRADING PTE., LTD., *in personas,*

Defendants.

BERNARD NEWMAN *Senior Judge*

OPINION

Appearances:

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

93 Civ. 7538 (BN)

SOGEM-AFRIMET, INC.,

Plaintiff,

v.

M/V IKAN SELAYANG, her engines, boilers, machinery, etc., *in rem*, FEDNAV LIMITED, PACIFIC CARRIERS PTE., LTD., and CHRISHOLM TRADING PTE., LTD., *in personas,*

Defendants.

OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Bernard Newman, *Senior Judge*:[1]

Sogem Afrimet, Inc. ("plaintiff') brings this action grounded in Admiralty against Fednav Limited ("defendant")[2]. Plaintiff seeks money damages in the amount of $270,161.49, plus interest and costs, for the marine miscarriage of zircon sand from Brisbane, Australia to Brownsville, Texas. After discharge at Brownsville, plaintiff maintains that there was rust found mixed with the zircon sand. Although attempts were made to purify the sand, plaintiff asserts that because of the contamination, plaintiff's buyers refused to

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[1] Bernard Newman, Senior Judge of the United States Court of International Trade, sitting as United States District Judge by designation.

[2] The court granted defendant's motion to dismiss all claims against Pacific Carriers PTE., LTD., and Chrisholm Trading PTE., LTD. (R. 299).

accept the sand. Plaintiff maintains that defendant's failure to properly prepare the vessel's hold was the cause of the rust contamination.

Defendant, a Canadian operator and time-chartered owner of the motor vessel Ikan Selayang contends that it implemented its normal procedures to prepare the vessel's hold to carry plaintiff' zircon sand. Defendant argues that the rust found on the zircon sand was not caused by any miscarriage of the cargo or deficiency of care aboard the ship. In response to plaintiff's clams, defendant suggests several alternative scenarios as to how plaintiff's sand became contaminated. In any event, defendant states that it exercised due diligence in its transport of plaintiff's sand and that plaintiff's representative had declared the hold fit to carry the cargo. Additionally, defendant argues that plaintiff failed to give it proper notice of any harm to the cargo and did not sufficiently attempt to mitigate its damages.

THE RECORD

Plaintiff presented six witnesses: Holly Chapell, Manager of Exotic Materials for Sogem-Afrimet; Rigoberto Gonzalez, Dock Superintendent for Dix Shipping Company; David Lapeyre, General Manager for the Brownsville Gulfside Warehouse; Robert Naegele, employee of Ewig International Marine Corporation; Dr. Brandt Rising, President and Laboratory Director of Umpire and Control Services; and Captain John Alder, President of John Alder & Company. Defendant presented two witnesses: Renée Lessard, Ship operator for Fednav LTD.; and Clinton Barrans, Claims Manager for Fednav LTD. In all, 133 exhibits were admitted into evidence at the trial.

Pursuant to agreement by counsel and F.R.C.P. Rule 32(a)(3)(E), the depositions of Gregory Dunn, Manager for Australian Laboratory Services; Cecil Martin, Shipping Manager for Consolidated Rutile Limited; Neal Stewart, Processing Manager for Consolidated Rutile Limited; Paul Vogel, employee of Aus-

tralian Laboratory Services; Michael Pearson, Director of Plumley, Pearson & White; Hector Gonzalez, employee of Ewig International Marine Corporation; Kenneth Jones, Plant Manager of Elf Atochem; Anne Marie Philippaerts, employee of J. Haenecour & Co.; Zbigniew Stasiak, Chief Officer of the Ikan Selayang; and Captain Malcolm Gater, Master of the Ikan Selayang, were admitted into evidence.

FINDINGS OF FACT

Plaintiff, a New York based buyer, seller, and trader of non-ferrous minerals and metals, had an exclusive arrangement to buy zircon sand[3] from Consolidated Rutile Limited (hereinafter "CRL"), an Australian Company, for resale in North America and Mexico. Defendant, a Canadian operator and time-chartered owner of the motor vessel Ikan Selayang, entered into a charter party with plaintiff for the vessel to transport plaintiff's cargo (Exh. 2). The cargo, in the instant case, consisted of 700 metric tons of premium grade zircon sand to be delivered from Brisbane, Australia to Brownsville, Texas aboard the M/V Ikan Selayang. A charter broker company, M.I.D. Ship Marine Inc. ("MID"), was used to obtain the space aboard the ship for the carriage of the cargo. MID received and relayed all communications between defendant and the plaintiff. In the contract of carriage, defendant warranted that Hold 6 of the M/V Ikan Selayang its decks and its stanchions would be swept, cleaned, and be made suitable for the bulk shipment of plaintiff's zircon sand before the vessel was brought to Brisbane for loading.

On August 20, 1991 plaintiff purchased 700 metric tons of premium grade zircon sand from CRL for A$340.00 (Australian dollars) per metric ton F.O.B. vessel, a total of A$238,000.00[4]. CRL operates a mill in Pinkemba, Brisbane

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[3] Zircon sand is a highly refined mineral sand used in the manufacture of glazes for tiles and other sanitary ware.

[4] Based upon existing exchange rates at the time of the sale, the price for the zircon sand in United States Currency was approximately $266.56 per metric ton for a total of $186,592.

that subjects the zircon sand to a rigorous separating process in order to meet the premium grade specifications. At the CRL mill, the zircon sand passes through several stages of electromagnetic processing to separate conductive material from nonconductive material. The zircon sand was subjected to further treatment by putting it through a vibrating screen with 2 centimeter holes and a second screen with 1 millimeter holes. After the larger material had been separated, the zircon sand was subjected to 8 high voltage electrostatic rotating rolls designed to remove the magnetic rust and iron from the non-magnetic sand. The final result of this process should result in premium grade zircon sand that contained a minimum of 66.0% zircon silicate and which has had virtually all contaminants eliminated.

The finished premium grade zircon sand is held in "product bins" at CRL's dry mill before being transported from the mill to a storage location at the Hamilton Wharf in Brisbane. The sand was thereupon loaded into tipper trucks[5] inside the dry mill by pulling the cargo beds of the trucks directly beneath the product bins inside the dry mill. The product bins themselves were fully enclosed to prevent contamination of its contents. Furthermore, the dry mill was covered by a roof to prevent any contamination while the trucks were being loaded. During the transport to the Hamilton Wharf, the trucks were fully tarped in order to avoid any form of contamination of the zircon sand, and the tarps remained on the trucks during the discharge of the load at the storage facility.

After the zircon sand was unloaded at the storage facility, it was loaded onto the ship using a series of mobile and fixed conveyor belts. Prior to the actual loading but after the sand was placed onto the conveyor belts, Australian Laboratory Services ("ALS") took samples of the zircon sand for analysis. The purpose of this analysis was to ensure that no rust or other foreign material entered the cargo beds when the trucks

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[5] Tipper trucks have a mechanism that allows the body of the truck to be tilted so the material will flow out of the body at a certain angle.

transported the material from the mill in Pinkenba to the Hamilton Wharf.

Defendant contends that prior to the loading of the zircon sand onto the vessel, the sand was moved around from point to point ashore in Australia by CRL and that this travel exposed the sand to rust, iron, pebbles, and dirt from various sources including other bulk cargoes, trucks, metal roofs, and conveyor belts. The court, however, finds that the evidence fails to support this conclusion. Neal Stewart, Processing Manager for CRL, testified regarding the processing of the zircon sand prior to loading onto the ship. CRL took samples of the zircon sand every two minutes on its way to the product bins inside the dry mill, and automatic samples of the final zircon sand product were tested daily by ALS. Although CRL processes Ilmenite, as well as zircon sand, which has a 33% iron content and can be magnetic, the tests of the zircon sand taken by CRL and ALS in the twelve months preceding the loading of the M/V Ikan Selayang were within contract specifications and failed to reveal any contamination. Hence, no prior history of any contamination existed with respect to the operating procedures of the laboratory.

Furthermore, the tipper trucks used to transport the zircon sand from the mill to the loading wharf were used only to transport zircon sand in order to avoid any contamination with other mineral sands or rust. Consequently, the proof in this case establishes that no rust contamination had ever been introduced to the tipper trucks and that they were clean and free from contaminants. CRL's Shipping Manager, Cecil Martin, testified that the trucks were covered at all times with tarpaulins to protect the material inside the cargo beds from being contaminated during transport. During the loading period of the zircon sand in the CRL mill, the trucks and the mill were protected by a roof above the mill. The tarpaulins contemporaneously remained on the trucks during the journey from the CRL mill to the Hamilton Wharf, and were designed to discharge the zircon sand at the wharf without removing the tarps covering the cargo beds.

Nor could the contamination come from the warehouse. The roof on the warehouse and the roof covering the conveyor belts were made of galvanized iron in order to guard against rust.

Further, the mobile and fixed conveyor belts were made of rubber and did not come in contact with any metal or iron that would have contaminated the zircon sand while being transported on the conveyor belts. Therefore, the court finds that the zircon sand was not contaminated prior to loading onto the M/V Ikan Selayang.

Before the transfer of the zircon sand to the M/V Ikan Selayang, defendant and the vessel's officers prepared the vessel's No. 6 Hold for the zircon sand pursuant to defendant's "Standard Requirements" for hold cleanliness. These included the following pertinent instructions:

> All loose rust scale must be removed from the hold prior to loading, with particular attention being given to the underside of the hatch covers, the coaming faces, the underdeck spaces at both ends of the hold, the undersides of the top tanks, the inner surfaces of the ship's shell plating, the "hidden flanges of the frames and the upper and lower frame brackets, the fore and aft'r bulkheads including ladder flanges and ledges, ventilator trunkings ledges and grills and tank tops.

Before the M/V Ikan Selayang reached Brisbane, Australia for the loading of the zircon sand, the ship dropped anchor in Masinloc, Phillippines. In Masinloc, defendant hired shore labor to clean the vessel's hold because No.6 Hold was described in the Master's Report as "not so good" (Exh. K-3). About twenty shore laborers were hired to remove hard rust scale from the steel surface inside of the hold. Sledge hammers, chipping hammers, and scrapers were used only on the areas of the ship that the laborers could physically reach from the floor of the hold. Neither scaffolding nor mobile man lifts were used to reach the upper reaches of the hold. Subsequently, as testified by the Chief Mate, the upper reaches of

the hold could not be hammered and scraped of hard rust scale, but instead, the upper parts of the hold were sprayed with pressurized water "just for removing loose paint and loose rust over there and the residue of any cargo if that existed" (Deposition of Zbigniew Stasiak, p. 89). It should be emphasized that the pressurized water spray was not designed for removing hard rust scale.

Apparently, defendant did not believe scaffolding was necessary to properly clean No. 6 Hold and thus, did not instruct the ship's crew to assemble scaffolding to reach the upper areas of the hold (Stasiak Deposition, pp. 85-89). After leaving the Phillippines, the crew of the Ikan Selayang continued to chip and scrape excess rust and paint from inside No. 6 Hold. At no time, however, were the upper regions of the hold manually chipped or scraped.

Upon the vessel's arrival in Brisbane, CRL on behalf of plaintiff appointed Michael Pearson, an independent surveyor, to inspect the holds number 3 and 6 prior to the loading of the zircon sand. According to Pearson, he inspected both Hold number 3 and Hold number 6 within a span of approximately 10-15 minutes. His responsibilities included, among other things, inspecting the hatch coaming and drainage channels around the perimeter of the hatch opening, inspecting the outsides and insides of the hatch cover panels, descending partially down the access ladder on the forward bulkhead of one hold, and descending further down the forward bulkhead ladder to another landing and again inspect the ship's structures in the vicinity of the ladder. Hold no. 6 is 19.8 meters long and the hatch aperture is 9.6 meters long. Pearson did not bring any light into the No. 6 Hold in order to assist his inspection, despite the examination's requirement of visual inspections from distances ranging between five and thirty-five feet away. In his deposition, Pearson stated that it is possible that hard rust scale could come off the sides of the ship's hold if it was struck by a heavy object (Pearson Deposition, p. 57). He further testified that the opening and closing of hatch covers could cause prior cargo residues or rust

scale to become dislodged and fall down onto the remaining cargo. After his examination, Pearson certified each of the holds to be fit for the transport of zircon sand.

Plaintiff's expert, Captain John Alder, testified that a 10-15 minute inspection of holds 3 and 6 was "extremely cursory," and that a proper inspection of the holds should have taken one hour. Captain Alder added that without the proper equipment, such as scaffolding and man lifts[6], only a spot check of certain areas could be accomplished. After observing Captain Alder in court and closely examining his testimony, the court believes him to be entirely credible and finds that the evidence suggests that the inspection performed by Mr. Pearson was wholly incomplete and unsatisfactory. From the deck to the bottom of No. 6 Hold aboard the M/V Ikan Selayang was approximately 43 feet (R. 256). It is difficult to imagine that Pearson could possibly have had adequate time to check, in any way, all areas of the two holds within 10-15 minutes, let alone examine these areas closely.

Moreover, the record further suggests the absence of proper tools and equipment for the inspection. When this is considered in conjunction with the short time in which Pearson conducted the inspection, the evidence unequivocally supports the opinion of Alder. Therefore, notwithstanding Pearson's definitive declaration of the fitness of the holds to carry zircon sand, the court finds his opinion to be of little probative value.

Prior to the arrival of the M/V Ikan Selayang in Brownsville, Texas, the vessel stopped in Wilmington, North Carolina in order to discharge thirty-five hundred metric tons of zircon sand. To facilitate the offloading, a crane with a bucket was used to discharge the sand from the vessel's No. 6 Hold. The

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[6] Captain Alder testified that in some cases mobile man lifts, such as cherry pickers where men will sit in a basket, have been used to clean as well as inspect the higher up areas of the holds. The record does not reflect whether mobile man lifts were available on the vessel or at any time during the inspection by Pearson, and he never mentioned that he used any similar devices.

delivery of this shipment was uneventful, and there were no complaints regarding the condition of any of the zircon sand delivered to Wilmington.

On November 5, 1991, the M/V Ikan Selayang arrived in Brownsville, Texas. The following day on November 6, 1991 discharge of the zircon sand from No. 6 Hold commenced at 7:40 a.m. at which time Rigoberto Gonzalez, the dock superintendent for Dix Shipping Co., witnessed the hatches being open for the first time. Gonzalez testified that he noticed approximately 50 specks of what appeared to be rust less than three inches in size. Continuing, Gonzalez notified the chief mate of the rust specks, at which time the chief mate sent one of the crewmen down into the hold to pick up the specks. After the specks of rust had been picked up by one of the crewmen, Mr. Gonzalez testified that he had notified his boss of the discovery of the rust at the Brownsville dock. With respect to such alleged notification, the testimony of Gonzalez is unclear as to whether he notified Chapell of the spots he observed. Based upon the testimony of Chapell and her lack of reaction at the dock, the court finds that there was no effective communication respecting Gonzalez's observations of contamination in the zircon sand.

The unloading of the zircon sand continued throughout the day by means of a clam shell bucket on a crane which emptied the sand directly into dump trucks. Prior to its use, the clam shell bucket was fully inspected by Gonzalez who testified that he did not observe any rust, dirt or debris. Furthermore, Mr. Gonzalez inspected the seven or eight dump trucks used in the transport of the zircon sand. Gonzalez also stated that he commenced inspection of the trucks at 7:45 a.m. the day of the unloading by having the beds of the trucks lifted up so that he could visually inspect the inside of the trucks. He concluded that the dump trucks did not contain any contaminants. The zircon sand that was loaded onto the dump trucks was taken directly from the Ikan Selayang to the Brownsville Gulfside Warehouse.

Defendant contends that there was a rust mist on the outside of the clam shell buckets due to storage of the equipment outside. Specifically defendant points to a portion of Gonzalez's testimony where he stated that a red mist covered the clam shell buckets when they are about to be used early in the morning. Gonzalez also testified that the clam shell buckets contained no rust because they are constantly being used. Indeed, Gonzalez's testimony was extremely unclear, and after careful review the court believes that the fair inference which can be drawn from his testimony is that there may be some type of mist which appears on the buckets in the early morning but that there was no rust in the bucket which could have produced the large amount of particles found in the sand.

At the Brownsville Gulfside Warehouse, the zircon sand was placed onto a concrete pad which was specially laid for the receipt of zircon sand. The shipment of zircon sand was the first cargo ever to rest upon the new pad. The warehouse containing the sand was completely covered at all times. Once the entire shipment of 891 metric tons of zircon sand was placed in the Brownsville Gulfside Warehouse, there was a primary pile of sand and a secondary pile consisting of sweepings. The sweepings pile contained the last of the sand contained in the ship's hold, as well as, any sand that was dropped from the trucks or on the ground between the warehouse and the ship.

Of the 891 metric tons of zircon sand contained in the warehouse, plaintiff contends that 700 metric tons were contracted to be sold to Derivados Metal-Organicos, S.A. De C.V. ("Demosa"). Defendant counters that plaintiff did not furnish adequate evidence in support of its claim that there was a valid contract of sale entered into by plaintiff and Demosa. In resolving this factual dispute, the court finds that plaintiff has sufficiently established that it did have a contract to sell 700 metric tons of its zircon sand to Demosa.

Although the copy of the contract of sale presented to the court was unsigned, other evidence indicates that there was a

valid contract of sale (Exh. 7). Initially, Chapell specifically testified that there was a contract between the parties for the terms incorporated in the unsigned copy of the document. Moreover, Chapell explained that it was within the usual practice in business dealings between plaintiff and Demosa for the buyer not to return a signed copy of the contract. Importantly, the evidence indicates that there was performance by the parties which corresponded to the contract terms. Plaintiff did send an initial shipment of sand to Demosa and although it was rejected, Demosa complained of the quality of the sand and did not refuse delivery because there was no purchase agreement. Thus, based upon the document itself, the testimony of Chapell, and proof of performance, the court concludes that plaintiff sustained its burden to prove the existence of a contract for sale of zircon sand for $342 per metric ton between plaintiff and Demosa.

One truckload of zircon sand from the Brownsville Gulfside Warehouse was bagged and sent to Demosa in November, 1991. Although the first shipment of sand was dispatched, Demosa rejected the goods because the sand had been darker and yellower than Demosa's standard and would have yielded a final product with a yellow tinge. According to Gregory Dunn, manager of ALS, the presence of rust particles in the zircon sand could account for the sand's apparent yellow tinge. Consequently, Demosa did not accept the remainder of the 700 metric tons of zircon sand and considered its contract with Sogem no longer binding.

Of the remaining 891 metric tons of zircon sand, plaintiff contracted to sell 61 metric tons to Ferro Mexicana ("Ferromex"). On February 25, 1992 approximately 21.5 metric tons of zircon sand was sent from the Brownsville Gulfside Warehouse to Ferromex. After receiving the sand, Ferromex discovered rust contamination and demanded that the rust contamination be removed before completing the delivery. Plaintiff, upon hearing of the alleged contamination, notified David Lapeyre, the warehouse manager, who inspected the pile for rust. Lapeyre randomly drew samples of the sand with

his hand and discovered pieces of rust in the large pile of zircon sand. On April 2, 1992 representatives of Sogem and Ferromex held a meeting at the warehouse in which 1,000 pounds of the zircon sand was poured over a magnet. The magnet removed approximately one-quarter cup of iron pieces. Hopeful that this process would remove the rust from the sand, on April 7, 1992 Lapeyre, at the direction of plaintiff, used a triple grid magnet to attempt to remove the rust scale from the zircon sand.

A hopper was constructed which would direct the flow of the sand over three layers of grate magnets. The zircon sand was poured over the magnets and rust contaminate was caught by the magnets. Over 100 pounds of rust scale was removed from the sand by this method. Despite the fact that some of the rust was being filtered out of the pile after the sand was run past the three magnets, rust contaminate still remained mixed with the filtered sand. The entire process was necessarily stopped after every 6,000 pounds of sand was put through the hopper so that the rust could be cleaned off the magnets. On April 9, 1992 the warehouse notified plaintiff that the magnetic hopper was successful in removing much of the rust but that there was still a significant amount of contamination contained within the sand.

On April 21, 1992 a second truckload of zircon sand was sent to Ferromex which had also been found to have contained rust scale. Subsequently, plaintiff sought the advice of CRL on suggestions how to remove the contamination from the sand. CRL suggested passing the zircon sand through a screen either 0.600 millimeter or 0.850 millimeter woven wire and then poured over magnets. Although this information was conveyed to Brownsville Gulfside Warehouse, Lapeyre testified that, at the time, no facility could be located which could provide the type of screen sufficient to initiate this process. Moreover, Dr. Rising, who specializes in geochemistry, testified that it is doubtful that CRL's suggested process would have returned the zircon sand to it premium condition. Accordingly, unable to sell the zircon sand under its contracts,

plaintiff was compelled to sell the sand for salvage. The sale of the salvaged zircon sand amounted to $15,355.

During his inspection of plaintiff's cargo, Hector Gonzalez took samples of the zircon sand. The samples, in which he observed rust particles, were delivered to plaintiff's counsel through the Ewig Company and subsequently sent to Dr. Rising at Umpire & Control Services. Dr. Rising's analysis of the samples found contamination of the sand with rust scale, rust dust, and rust scale coated with red primer paint (Exh. 70). During the return of the samples by Dr. Rising, one of the five samples was lost. No explanation was offered to account for the missing sample. Despite the loss of one sample, the court finds that the evidence sufficiently supports plaintiff's contention that the returned samples were, in fact, zircon sand taken from the Brownsville warehouse.

By written correspondence dated April 16, 1992, plaintiff notified defendant of the zircon sand contamination. The notification of defendant was addressed to plaintiff "C/O M.I.D.-Ship Marine Inc.," the broker used by plaintiff to arrange the transport of this cargo. Plaintiff had previously always communicated with ship owners through a broker and specifically, in this case, had only contacted defendant through M.I.D.-Ship Marine Inc.

CONCLUSIONS OF LAW[7]

This case involves claims by the owner of premium grade zircon sand against an ocean carrier arising from an alleged breach of contract of carriage. The matter, therefore, falls within the court's admiralty jurisdiction. *Allied Chemical v. Companhia de Navegacao,* 775 F.2d 476, 481 (2d Cir. *1985), cert. denied,* 475 U.S. 1099 (1986). The private contract of carriage is the charter party which incorporates the United States Carriage of Goods by Sea Act ("COGSA"). 46 U.S.C.

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[7] Any conclusion contained within this section that also constitutes a factual determination should be deemed a finding of fact.

§ 1300 *et seq., Associated Metals & Minerals Corp. v. S.S. Jasmine,* 983 F.2d 410, 413 (2d Cir. 1993). Consequently, COGSA is the governing law in this matter.

Plaintiff insists that the defendants are liable for the loss of cargo under COGSA. In order for a party to enforce its rights under COGSA, "litigants must engage in the ping-pong game of burden shifting mandated by sections 1303 and 1304 of the Act." *Tubacex Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995). Initially, the burden falls on the plaintiff shipper, who must establish a *prima facie* case of loss. This burden is satisfied if the shipper can demonstrate delivery of the cargo in good condition to the carrier and either the arrival of less cargo than was loaded or delivery of the goods in damaged condition. *See* 46 U.S.C. §§ 1303(3) and 1304; *see also, Thyssen, Inc. v. S/S Eurounity,* 21 F.3d 533, 538 (2d Cir. 1994); *New York Marine & Gen. v. S/S Ming Prosperity,* 920 F.Supp. 416, 422 (S.D.N.Y. 1996). It is only after a plaintiff establishes *a prima facie* case, does the burden then shift, requiring the carrier to establish that any loss falls within one of COGSA's exceptions. *Westway Coffee Corp. v. M.V. Netuno,* 675 F.2d 30, 32 (2d Cir. 1982); *Judy - Philippine Inc. v. S/S Verazano Bridge,* 781 F.Supp. 253, 258 (S.D.N.Y. 1991).

A.

As a threshold matter, the court must address the issue of notice[8]. Defendant contends that the failure of plaintiff to give

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[8] The court rejects defendant's argument that plaintiff's decision to notify it through the broker M.I.D.-Ship Marine was improper. While it is true that plaintiff could have notified defendant directly, its ordinary course of business was to contact and receive messages from defendant through M.I.D.-Ship Marine, Inc. In correspondences dated April 16, 1992, plaintiff sent notification of the contamination of the cargo addressed to defendant c/o M.I.D.- Ship Marine Inc. The overwhelming evidence is that the parties communicated through the broker. For example, the invoices were sent to plaintiff by defendant through the broker, as were notices required under the Charter Party, and indeed, even the

notice until five months after the discharge of the sand defeats plaintiff's claim by operation of statute. Section 3(6) of the COGSA provides in relevant part:

> Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent the notice must be given within three days of the delivery.

46 U.S.C. § 1303(b). In this case the failure of the plaintiff to give notice to defendants within three days creates a presumption in favor of defendants that the cargo was delivered in good condition. Absent any contrary evidence, the presumption of the notice provision would defeat plaintiff's claim altogether. *See e.g., M.W. Zack Metal Co. v. the S.S. Birmingham City,* 291 F.2d 451, 453 (2d Cir. 1961); *Leather's Best Intern., Inc. v. MV Lloyd Sergipe,* 760 F.Supp. 301, 309-10 (S.D.N.Y. 1991). Notwithstanding the foregoing, "[a]ny such presumption of good delivery falls, however, once the plaintiff adduces any credible evidence tending to show that the cargo was damaged prior to delivery." *Ferrostaal Corp. v. M.V. Singa Wilguard,* 838 F.Supp. 757, 767 (S.D.N.Y. 1993); *see also, Pacific Employers Ins. Co. v. M/V Gloria,* 767 F.2d 229, 238 (5th Cir. 1985); *C. Itoh & Co. v. Hellenic Lines, Ltd.,* 470 F.Supp. 594, 597 (S.D.N.Y. 1979). As will be discussed more fully below, the record does, indeed, show that plaintiff has produced evidence that the rust contamination took place while the zircon sand was in defendants' custody. The plaintiff has, therefore, put forth credible

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voyage instructions provided that the ship was to send required notices through M.I.D.-Ship Marine. Considering the undeniable fact that plaintiff and defendant had established a course of business which required information to be conveyed through the broker, it is entirely reasonable that plaintiff would notify defendant in this same manner.

evidence which rebuts the presumption afforded to defendant as a result of receiving late notice. Accordingly, having found that the late notice does not bar plaintiff's case, the court will address the substantive merit of plaintiff's claim.

B.

Merely overcoming the presumption of good delivery does not mean that plaintiff prevails on the ultimate issue. As previously stated, plaintiff is required to establish that it delivered the cargo to defendant in good condition but at outturn the cargo was damaged. Plaintiff argues that defendant received the zircon sand in good condition but delivered the sand in damaged condition due to contamination by rust. To establish a *prima facie* case, the shipper must adduce evidence that, standing alone, establishes both prongs of the claim. *R.B.K. Argentina v. M/V Dr. Juan B. Alberdi,* 935 F.Supp. 358, 368 (S.D.N.Y. 1996). In this case, the court finds that the plaintiff has established *a prima facie* case against the defendants.

The first part of the test requires that plaintiff establish that it delivered the cargo in good condition. Here, the evidence clearly illustrates that the sand was not contaminated by rust when it was received by defendant. Initially, there is the unrebutted testimony of plaintiff's Australian witnesses that all of the sand loaded into No. 6 Hold was in good condition. The record demonstrates the meticulous processing to which the sand was subjected. Indeed, it appears that every precaution was taken by the CRL mill to ensure that its sand was not infiltrated with impurities. Moreover, there is the laboratory evidence supporting plaintiff's claim that it delivered the sand in good condition. Gregory Dunn testified that random samples of the sand were taken as it was moved to the ship and these samples were analyzed at the ALS laboratory and no rust contamination was found.

Defendant concludes that because the samples for the first 700 metric tons of sand loaded into the No. 6 Hold were dis-

carded, the is no reliable measure of the condition of the sand that was ultimately delivered to Brownsville. The court does not agree with defendant's conclusion. Initially, the Australian witnesses testified that the entire shipment of sand was in good order. Moreover, even assuming a defect in the sampling of the sand ultimately bound for Texas, defendants' argument ignores the fact that before any sand was loaded the No. 6 Hold, more than 5000 tons of rutile sand was loaded into No. 3 hold, using the same conveyorbelt. Yet, there was no rust contamination of the rutile sand. Surely, if the conveyor belt was responsible for contaminating the zircon sand, it would have had the same effect on the previous load of sand. Finally, there was abundant evidence that many appropriate precautions were taken to ensure that the loading conveyors were maintained rust-free and that contaminants from prior cargo. As Judge Friendly aptly noted, one method of demonstrating good condition of goods at delivery "would be to show that the goods were prepared and packaged in accordance with proper procedures and were carried to the ship under conditions that should have prevented any damage to the contents en route." *Caemint Food v. Lloyd Brasileiro,* 647 F.2d 347, 354 n. 6 (2d Cir. 1981). Accordingly, even if the court did not consider the chemical analysis of the samples, plaintiff has clearly sustained its burden by establishing the careful procedures employed in loading the sand and the demonstrating that none of the cargo, other than the zircon sand unloaded in Texas, suffered any rust contamination. Therefore, the plaintiff has established the first prong of its *prima facie* case.

The court likewise finds that plaintiff has sufficiently sustained it burden of demonstrating that the cargo was damaged at outturn. There is no question that defendant was aware of the refined nature of plaintiff's sand. Defendant's own "standard requirements" regarding zircon sand demonstrate its knowledge of the importance of thorough cleaning. The requirements state:

> *ALL* loose rust scale must be removed from the hold prior to loading, with particular attention being given to the underside of the hatch covers, the coaming faces, the underdeck spaces at both ends of the hold, the undersides of the topside tanks, the inner surfaces of the ships shell plating, the "hidden" flanges of the frames and the upper and lower frame bracket, the fore and aft'r bulkheads including ladder flanges and ledges, ventilator trunkings ledges and grills and the tank tops.

Exh. J-1.

Moreover, it is also undisputed that at the time the revised stowage plan was presented to defendant the condition of No. 6 hold of the vessel was stated in the Master's Report to be "Not So Good" (Exh. K-3). The degree of rust and rust scale present in the hold was so problematic that a shore crew was retained to chip and scrape No. 6 Hold in preparation for the zircon sand. Despite, however, the presence of "heavy rust," as described by the vessel's Chief Mate, the shore crew physically chipped and scraped rust only to those areas which they could reach. The only attempt to clean the upper portions of No. 6 Hold was to use high pressure water spray, which according to the Chief Mate, was not designed to remove hard scale rust but only used to remove "loose paint and loose rust" and could not remove all of the rust.

Coupled with the showing of severe rust in No. 6 Hold, was the credible testimony of plaintiff's expert Alder who testified that there were many places in the upper areas of the hold which were likely to contain rust and may have even been in worse condition than the lower area. In addition, Alder explained that as the hold became less full, the increased vibrations of the ship would act to dislodge layers of rust scale. In point of fact, Pearson provides additional explanations that hard scale rust could have become dislodged if a grab had banged into the wall of the hold. Certainly, as the sand was unloaded at Wilmington, it is reasonable to conclude that the grab, used to offload the cargo may have struck some

area of the hold, thereby causing rust to fall upon the remaining sand which was delivered to Texas. Finally, the fact that analysis[9] of the rust found a coating of red primer paint frequently used in preparing the surfaces of steel ships for painting, creates another basis to determine that the rust originated in the No. 6 Hold. The short of the matter is that all of this evidence demonstrates the damage occurred while it was in the hold of defendant's vessel, and therefore the plaintiff has established its prima facie case. *See Arkwright Mut. Ins. Co. v. M.V. Oriental Fortune,* 745 F.Supp. 920, 923 (S.D.N.Y. 1990); *A.J. Cunningham Packing Corp. v. M/V Australian Exporter,* 719 F.Supp. 258, 259 (S.D.N.Y. 1989).

Defendant asserts that there were "numerous opportunities for the zircon sand to have picked up bits of rust during the discharge" in an attempt to cast doubt upon plaintiff's allegations as to what occurred. Specifically, defendant hypothesizes the rust may have come from a clamshell bucket used to discharge the zircon sand in Texas, that the front end loader may have contaminated the sand, that the rust came from either steel coils or a prior cargo of bulk sodium cargo which was stored at the Brownsville warehouse, and finally, defendant maintains that the sweepings of the zircon sand could account for the rust. The court finds that none of these assertions rise beyond mere possibility and are generally refuted by the evidence presented in this case.

Initially, as previously noted the testimony of Gonzalez was hardly clear as to whether there was rust on the clamshell bucket. No evidence was ever presented that definatively illustrated that rust existed on the clamshell bucket and if so, how extensively was the bucket rusted. Moreover, even assuming that some rust was present on the bucket, the logical conclusion to defendant's argument, that over 100 pounds

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[9] The court finds that the deposition testimony of H. Gonzalez and the live testimony of Dr. Rising demonstrated by the fair preponderance of the evidence that the samples tested by Dr. Rising were, in fact, samples of plaintiff's zircon sand taken from Texas. Fed. R. Evid. 901(a); *see also, United States v. Grant,* 967 F.2d 81, 82 (2d Cir. 1992), *cert. denied,* 113 S.Ct. 1293 (1993).

of rust chips were the result of the clamshell bucket strains credulity to its breaking point.

Nor does the evidence suggest that the trucks were responsible for the rust. Plaintiff provided evidence of the careful inspection and cleaning of the trucks prior to the discharge of the sand. The deposition testimony of the vessel's Chief Officer and the trial testimony of Adler each point to the far more likely conclusion that the No. 6 Hold was responsible for the rust contamination.

It is even less likely that the rust was the result of any contamination in the warehouse. The testimony of Lapeyre is uncontested with respect to the special precautions taken in making the warehouse ready for plaintiff's sand. In particular, was the fact that the sodium nitrate cargo was not even present at the time when the zircon sand was brought to the warehouse and that an entirely new concrete pad was created so that the sand would not be contaminated by any residue left on the previous floor of the warehouse. Plaintiff's sand was the first bulk cargo to be laid upon the new pad, hence, any previous rust residue that existed on the original floor of the warehouse could not have affected the sand.

Defendant's conjecture that the steel coils were somehow responsible for the approximately 100 pounds of rust is unsupported by the evidence. The coils were not present when the zircon sand shipment arrived. More, no evidence was introduced suggesting that the steel coils became rusty. In addition, the concrete pad would have prevented any prior contamination in the warehouse from affecting the sand, and the two piles of zircon sand were covered with plastic sheets at the Warehouse. Consequently, defendant's theory regarding the coils obviously does not diminish plaintiff's proof establishing its prima facie case.

Finally, defendant seeks to imply that perhaps some of the sweepings were co-mingled with the primary pile and thereby accounting for the rust contamination. Defendant rests this assertion upon the shaky foundation of alleged inconsistent testimony of Gonzalez and Lapeyre. While Gonzalez states

that two trucks carried the sweepings, Lapeyre indicated that there was only one. Defendant's entire argument rests on the proposition that Lapeyre was incorrect and there is a missing load of sweepings which defendant contends may have been dumped on the primary pile[10]. The court does not find the testimony to warrant such a conclusion. Repeatedly throughout his testimony, Lapeyre reminded the court that the events to which he was testifying occurred nearly five years ago and that his recollection was not perfect. Moreover, when he spoke about one truckload of sweepings, Lapeyre's answer was not in response to a question asking how many trucks carried the sweepings. Essentially, defendant is attempting to take Lapeyre's testimony out of the context in which it was given. Considering Lapeyre's statements regarding his difficulty in recalling minor details due to lapse of time and the fact that he was never specifically asked how many trucks carried the sweepings, the court is not persuaded that any true contradiction exists.

In any case, defendant offers nothing more than speculation that there was a commingling of the primary pile and the sweepings. Further, even if the sweepings pile held the 100 pounds of rust which was discovered in the sand, the sweepings came out of the same hold as did the primary pile. Therefore, even accepting defendant's theory of what happened, that version does not discount the likelihood that the rust contained in the sweepings originated from No. 6 Hold. Each of the scenarios put forth by defendant rest upon "surmise and conjecture" which may not be substituted for proof. *See Minemet, Inc. v. M.V. Mormacdraco,* 536 F.Supp. 769, 775 (S.D.N.Y.), *aff'd,* 714 F.2d 115 (2d Cir. 1982). Upon examination, the fair preponderance of credible evidence supports plaintiff's allegation that it delivered the cargo to defendant in good condition and received damaged goods at outturn.

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[10] It is noteworthy that defendant, in its post-trial brief does not provide a citation to support its claim that "Mr. Lapeyre thought that there was on truckload of sweepings." Defendant's Memorandum of law, p. 13-14.

Accordingly, the court finds that plaintiff has sustained its burden of proving its prima facie case. *Goya Foods, Inc. v. S/S Italica,* 561 F.Supp. 1077, 1083 (S.D.N.Y.), *aff'd,* 742 F.2d 1434 (2d Cir. 1983).

C.

The duty imposed by COGSA upon a shipowner is to exercise due diligence in providing a seaworthy ship. 46 U.S.C. § 1303(1)(a). "Thus, even if unseaworthiness caused the loss, the shipowner can still be exonerated from liability under COGSA if it establishes that it exercised due diligence in attempting to make the ship seaworthy." *Complaint of Tecomar S.A.,* 765 F.Supp. 1150, 1179 (S.D.N.Y. 1991). Defendant argues that the actions it undertook to prepare No. 6 Hold demonstrate that it exercised due diligence, employed all reasonable precautions, and should therefore not be held liable[11]. After careful review of the entire record, the court cannot accept defendant's argument.

There is no question that defendant was experienced at handling mineral sands. Indeed, the record plainly demonstrates that defendant's own "standard requirements" for the carriage of mineral sands stated, respecting zircon sand, that "any form of contamination is harmful" Exh. J-1. Likewise, defendant, after being informed that the hold was "not so good," hired a shore crew to come aboard the ship to chip and scrape away the hard scale rust which had accumulated on the hold. The problem with defendant's actions stem from the fact that in its guidelines for handling mineral sands, such as

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[11] Defendant's reliance on the survey conducted by Pearson is misplaced. As previously discussed, the court accepts the expert opinion of Alder who opined that the examination of the Number 3 and 6 holds could not have been complete. Pearson simply did not spend enough time to be able to adequately make a determination of the fitness of the hold. Accordingly, his conclusion that the hold was fit for zircon sand and that the rust contaminate did not originate in the hold if of no persuasive value.

plaintiff's cargo, defendant states that "all" rust must be removed from the hold. As noted, defendant did hire a shore crew to eliminate the rust in the hold, but erected no scaffolding to permit the clearing of rust on the upper level of rust. While there was a pressurized water spray applied to the upper areas of the hold, the Chief Mate himself admitted that the water spray was designed to adequately dislodge already loose rust and paint chips, but not to scrape hard scale rust. Accordingly, the hard scale rust which would have been located in the upper portion was left virtually untreated in the hold. Since this rust could be knocked loose by the increased vibrations of a nearly empty hold during an ocean voyage, heavy machinery which may be utilized to unload the sand, or by the opening and closing of the hatch, defendant failed in its duty of due diligence under COGSA. *See Siderius v. M.V. Amilla,* 880 F.2d 662, 66 (2d Cir. 1989). Defendant could have prevented the risk of rust falling into plaintiff's cargo but did not and therefore cannot be said to have exercised due diligence.

D.

Defendant argues that even if the court finds that defendant's vessel was not fit for receipt of the cargo, the act of plaintiff's inspector certifying the fitness of the hold establishes an affirmative defense which exonerates defendant. Defendant first points to the charter party which provides that the owners are to have the charterer's representative pass the holds as clean or ready. Since plaintiff's representatives did judge No. 6 Hold to be fit for the zircon sand, defendant asserts the applicability of the section of COGSA providing "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . [any] act or omission of the shipper or owner of the goods, his agent or representative" 46 U.S.C. § 1304(2)(i). Because plaintiff's inspector certified the hold as fit to store plaintiff's zircon sand, defendant maintains that such certification was an "act or omission

of the shipper" precluding a finding of liability on defendant. The court, however, does not accept defendant's claim.

Section 1303(1) of COGSA provides:

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

46 U.S.C. § 1303(1). It has long been recognized that stowage falls within the scope of a carrier's warranty of seaworthiness. *Nuzzo v. Rederi, A/S Wallenco,* 304 F.2d 506, 508 (2d Cir. 1962); *Bloomer Chocolate Co. v. Nosira Sharon Ltd.,* 776 F.Supp. 760, 776 (S.D.N.Y. 1991), *aff'd,* 963 F.2d 1552 (2d Cir. 1992). In a situation similar to the case at bar, the court found that rust scale which caused damage to stowed cargo constituted a breach of the warranty of seaworthiness. *GTS Industries S.A. v. S/S Havtjeld,* 887 F.Supp. 531, 537 (S.D.N.Y. 1994), *aff'd,* 68 F.3d 1535, 1535-36 (2d Cir. 1995). The plain language of COGSA demonstrates that the Charter Party may not lessen any obligations imposed upon the carrier. Specifically, the law states:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties or obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.

46 U.S.C. § 1303(8). The law of the Second Circuit interpreting this provision is equally unambiguous, COGSA does not permit the carrier to divest itself of the duty to insure the proper stowage of the cargo. *Associated Metals & Minerals Corp. v. M/V Arktis Sky,* 978 F.2d 47, 50 (2d Cir. 1992); *Nichimen Co. v. M.V. Farland,* 462 F.2d 319, 330 (2d Cir. 1972). No matter what provisions existed within the Charter

Party, it was defendant's responsibility alone to maintain the No. 6 hold, in an manner fit to stow plaintiff's zircon sand.

Defendant offers a unique argument[12] as to why the court should depart from the explicit holding of the Second Circuit. In its reading of a recent decision by the Supreme Court, defendant maintains that the Supreme Court has questioned the concept of non-delegable duties arising under Section 1303 of COGSA as expressed by the Second Circuit, in light of the statutorily expressed exception to carrier liability as set forth in Section 1304(2)(i). *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer,* 115 S.Ct. 2322, 2329 (1995).

After examining the *Sky Reefer* decision, the court finds that defendant has misapplied that case. First, as defendant candidly admits, the entire discussion of the matter is merely *dicta,* and thus, at best, may only be used persuasively. Secondly, it is clear that when acknowledging the differing interpretations of COGSA, the Supreme Court was merely laying out the respective arguments set forth by the petitioner and respondent in that case. Indeed, in the very next paragraph, the Court stated that petitioner's claim regarding non-delegable duties was "premature." *Id.* In light of such language, the only reasonable reading of *Sky Reefer* requires the ultimate conclusion that the Court chose not to pass judgment, even in *dicta,* upon the Second Circuit's established view. Defendant's argument must therefore be rejected.

E.

Having found that the plaintiff has established its burden and that defendant has failed to set forth any valid defense, the court now turns to the issue of damages. Defendant makes two claims with respect to the proper calculation of damages. First, defendant argues that the plaintiff has failed to submit

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[12] Defendant also seeks to rely upon the reasoning articulated in a Note published in the Tulane Maritime Law Journal. In light of the Second Circuit's established rulings on this issue, the court finds the submission of this publication to be unpersuasive.

sufficient evidence of its contract with Demosa. Second, defendant maintains that plaintiff did not adequately mitigate its damages. The court finds each of these claims to be without merit.

The parties are not in dispute as to how damages are to be properly calculated under the law. It is well settled that "the general measure of damages is the difference between the fair market value of the goods at their destination in the condition in which they should have arrived and the fair market value of the goods in the condition in which they actually did arrive." *Texport Oil Co. v. M/V Amoltntos,* 11 F.3d 361, 365 (2d Cir. 1993); *Kanenmatsu-Gosho Ltd. v. M/T Messiniaki Aigli,* 814 F.2d 115, 118 (2d Cir. 1987); *Valerina Fashions v. Hellman Intern. Forwarders,* 897 F.Supp. 138, 140 (S.D.N.Y. 1995). The parties agree that in a case where a contract exists, the proper measure of a plaintiff's damage is the price plaintiff was to receive under the contract minus the amount of money plaintiff received by selling the damaged goods. *Id.* at 365; *see also, Pacol (Canada) Ltd. v. M/V Minerva,* 523 F.Supp. 579, 582-83 (S.D.N.Y. 1981).

Here, the court has determined that there was sufficient evidence to find that there was two contracts, one between plaintiff and Demosa and one between plaintiff and Ferromex. Of course an actual contract for resale is not even requried for the plaintiff to sustain its burden of proving lost profits; rather, the agreived party "need only proffer proof tending to show its loss." *Valenrina Fashions,* 897 F.Supp. at 141; *see also, Goldberg v. World Wide Shippers & Movers,* 236 F.2d 198, 202 (7th Cir. 1956) (in order to properly establish lost profits, "no greater degree of certainty of proof is required than for any other fact essentail to be established in a civil action"). Therefore, even if the court were to find that the proof of contract between plaintiff and Demosa was lacking, there is still sufficient evidence based on the previously signed contract that the market price for plaintiff's zircon sand is what plaintiff claims. In any event, the expected return upon the contract with Demosa for 700 metric tons of zircon

sand was $239,400 less the salvage proceeds of $12, 950 for a total of $226, 450. With respect to the 61 metric tons of zircon sand rejected by Ferromex, the expected return on the contract constituted a total of $5,737.27. Finally, the measure of damage for the additional 130 metric tons of zircon sand, for which there was no sale contract, should properly be calculated from its FOB purchase value plus freight charges minus any proceeds from salvage. Here the cost of the additional zircon sand carried from Willimington and retained in the Brownsville Gulfside Warehouse including the freight[13] less salvage proceeds of $2,405 amounts to $37,974.22. Upon the complete calculation, the total measure of damages sustained by plaintiff is $270,161.49. Accordingly, defendant is liable to plaintiff for this amount. *See Valerina Fashions,* 897 F.Supp. at 140 (under COGSA damage calculations are designed to return to plaintiff what was actually lost).

Defendant also maintains that plaintiff failed to properly mitigate its damages. Specifically, defendant points to plaintiff's rejection of CRL's suggestion that the sand be filtered through a .6 millimeter screen and then run through a series of magnets in order to attempt the removal of additional rust. While the plaintiff is always under a duty to reasonably mitigate the damages it sustains, the burden to show failure to mitigate lies with the defendant. *Emmco Ins. Co. v. Wallenius Caribbean Line, S.A.,* 492 F.2d 508, 514 (5th Cir. 1974); *C. Itoh & Co. (America) v. M/V Hans Leonhardt,* 719 F.Supp. 479, 510 (E.D.La. 1989) *(citing Emmco); C. Itoh & Co. Etc. v. Hellenic Lines, Ltd.,* 470 F.Supp. 594, 599 (S.D.N.Y. 1979) *(citing Emmco).* Here, defendant has failed both in demonstrating that the measures taken by plaintiff did not constitute a reasonable effort and in showing the portion of

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[13] Defendant contends that the freight costs to plaintiff was $34.50 per ton. However, according to the Charter Party, Clause 61, the ocean freight rate from delivery to Wilmington was $34.50. The cost of ocean freight for delivery to Brownsville Texas, however, was $39.75 (Exh. 2, p. 4). Thus, the court finds plaintiff's calculation as to the cost of ocean freight to be correct.

the loss caused by plaintiff's failure to take additional steps. *C. Itoh & Co. (America) v. M/V Hans Leonhardt*, 719 F. Supp. at 510.

It is undisputed that when plaintiff discovered the fact that its zircon sand was contaminated with rust, measures were taken to rectify the situation. For several days, the zircon sand was passed through three separate magnets but significant rust still remained in the sand. Clearly, plaintiff took action to eradicate the problem. Moreover, defendant presents no evidence to suggest that the screen would have reduced the rust content in the zircon sand to an acceptable level. It is important to note the very detailed processing the sand undergoes when it is manufactured. Included in the process is the use of eight electrostatic separators spinning at 350 rpm and charged with 25,000 volts of electricity in an effort to remove conductive contaminates such as iron. It is difficult to imagine that filtering the zircon sand through a screen onto magnets would significantly reduce the levels of rust contained in the sand anymore than Lapeyre's previous attempts.

Additionally, at the time when CRL suggested the use of the screen and magnets, plaintiff's representative could not locate the type of screen that was needed[14]. Finally, Dr. Rising stated that it was not possible to guarantee that this method would filter out all of the contaminants. Dr. Rising testified that the only method he thought "would probably work" to clean the sand to an acceptable level would be a chemical wash (R. 214). Because, of the amount of sand involved in this case, the time it would take to employ such a measure, and the expense plaintiff would incur in order to achieve the desired results, a chemical wash was not feasible.

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[14] The fact that, well after the fact, defendant was able to locate a screen manufacturer is of no moment. The court has no reason to doubt that plaintiff and its agent engaged in a reasonably diligent search for the screen. At the time, plaintiff was still hoping to sell its sand under the contract and would therefore have every reason want the sale to proceed.

In short, defendant has not established any evidence tending to show that plaintiff failed to take reasonable steps to mitigate the damage to the sand. More, defendant has not been able to demonstrate that the screen method it urges would have had any greater effect than the method employed. Lastly, the only evidence presented regarding other methods available to plaintiff, supports plaintiff's view that use of the screen would have most likely been futile. Thus, the court finds that defendant has not shown that the methods used by plaintiff were insufficient or that defendant's proposed method of mitigation would have substantially improved the zircon sand.

Finally, plaintiff seeks prejudgment interest and costs in connection with the prosecution of this case. With respect to interest, plaintiff proposes that the rate should be based upon the average yield of a six-month Treasury Bill and run from the date of delivery of the damaged cargo. It is well settled that "the allowance of interest is the general rule, and disallowance is supportable only in the face of exceptional circumstances." *Bloomer Chocolate,* 776 F.Supp. at 779. Notwithstanding, that general rule, the award of interest still rests within the sound discretion of the court and may be disallowed "where peculiar circumstances would make such an award inequitable." *Reeled Tubing, Inc. v. M/V Chad G,* 794 F.2d 1026, 1028 (5th Cir. 1986). The court finds circumstances within this case to render any award of prejudgment interest inequitable.

The record is replete with instances of delay occasioned by plaintiff. Initially, while it does not impact on plaintiff's ability to recover its actual losses, plaintiff did not notify defendant of any damage until five months after discharge. Moreover, plaintiff did not file this action until nearly two years after the initial discharge. Throughout the course of the trial plaintiff, while never acting improperly, often allowed long delays before documents were produced to defendant. Considering the circumstances, it would be manifestly unjust to allow plaintiff to collect interest for periods of elapsed time

considering that many significant delays were occasioned solely by plaintiff's actions. Plaintiff should not be permitted to profit from lapses of times it predominately caused. Accordingly, plaintiff's request for interest and costs is denied.

CONCLUSION

The court finds defendant to be liable to plaintiff for the damage sustained to plaintiff's zircon mineral sand. In accordance with this opinion, plaintiff shall recover $270,161.49 in compensatory damages. Plaintiff's request for pre-judgment interest is hereby denied. Each side shall bear its own costs.

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED

Dated: December 20, 1996
New York, New York

/s/ BERNARD NEWMAN
Bernard Newman, U.S.D.J.,
by designation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civil 7538 (BN)

Filed December 23, 1996

SOGEM-AFRIMET, INC.,

Plaintiff,

—against—

M/V IKAN SELAYANG, her engines, boilers, machinery, etc., in rem, FEDNAV LIMITED, PACIFIC CARRIERS PTE., LTD., and CHRISHOLM TRADING PTE., LTD., in personas,

Defendants.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Bernard Newman, United States District Judge, who on December 20, 1996 having issued his Opinion (77777), finding in favor of the plaintiff in the amount of $270,161.49, it is,

ORDERED, ADJUDGED AND DECREED: That pursuant to the Court's Opinion (77777) dated December 20, 1996, the defendant is liable to plaintiff for the damage sustained to plaintiff's zircon mineral sand; plaintiff shall recover $270,161.49 in compensatory damages, it is further,

ORDERED, ADJUDGED AND DECREED: That plaintiff's request for prejudgment interest is hereby denied; each side shall bear its own costs.

DATED: New York, New York
December 23, 1996

JAMES M. PARKISON:

CLERK

BY: ROBERT H. DONOS
DEPUTY CLERK

THIS DOCUMENT WAS ENTERED ON
THE DOCKET ON 12/24/96.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 Civ. 7538 (BN)

Filed October 9, 1997

SOGEM-AFRIMET, INC.,

Plaintiff,

—v.—

M/V IKAN SELAYANG, her engines, boilers, machinery, etc., *in rem*, FEDNAV LIMITED, PACIFIC CARRIERS PTE., LTD., and CHRISHOLM TRADING PTE., LTD., *in personas*,

Defendants.

CORRECTED JUDGMENT

Whereas the above-entitled action was assigned to the Honorable Bernard Newman, Senior Judge of the United States Court of International Trade, sitting by designation, who on December 20, 1996 issued his Opinion, Findings of Fact and Conclusions of Law (77777), finding in favor of plaintiff Sogem-Afrimet, Inc. in the amount of $270,161.49, it is

ORDERED, ADJUDGED AND DECREED: That, pursuant to the Court's Opinion (77777) dated December 20, 1996, defendant Fednav Limited, *in personam*, and defendant M/V IKAN

SELAYANG, *in rem*, are liable to plaintiff Sogem-Afrimet, Inc. in the amount of $270,161.49 and it is further

ORDERED, ADJUDGED AND DECREED: That, pursuant to the Court's Opinion (77777) dated December 20, 1996, plaintiff's complaint is dismissed as against defendant Pacific Carriers PTE., Ltd. and as against defendant Chrisholm Trading PTE., Ltd., and it is further

ORDERED, ADJUDGED AND DECREED: That plaintiff's request for pre-judgment interest prior to December 23, 1996 is denied, and that no party shall recover costs as against any other party.

Dated: New York, New York
August 7, 1997

ENTER,

BERNARD NEWMAN
Honorable Bernard Newman,
U.S.D.J., By Designation

THIS DOCUMENT WAS ENTERED ON
THE DOCKET ON 10/4/97.

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Apr. 16, 1936, c. 229, § 1, 49 Stat. 1208.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

April 16, 1936, c. 229, § 2, 49 Stat. 1208.

§ 1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be

bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.

§ 1304. Rights and immunities of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the trans-

portation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

Excerpt from Transcript of Deposition
Testimony of Michael Pearson

[36] Q. In your opinion, as a surveyor, had the owners of Ikan Selayang exercised due diligence in preparing the hold?

PLAINTIFF'S ATTORNEY: I object. It calls for a legal conclusion.

Q. You can go ahead and answer. Did you hear the question because the objection cut out my question?
A. I understand the question. Yes.

* * *

Excerpts from Transcript of Deposition
Testimony of Zbigniew Stasiak

[31] Q. During the course of the discharge did you observe any contamination in the sand?

A. No.

* * *

[116] Q After the ship's crew used the SIBI Press equipment on the upper wing tanks in the number 6 hold did you visually inspect the quality of the work?

A Yes.
Q And what was the result of your inspection?
A Very good.
Q Was there any hard scale rust left?
A No.
Q Was there any loose rust left?
A Nothing like that.
Q Were there any flakes of paint chips?
A Cannot be possible.

* * *

Excerpts of Trial Testimony of John Alder

[267] Q. Do you have an opinion as to whether that action would have been appropriate here?

A. Well, I never saw the ship, but from the description of the condition of the lower part of the hold, where the chief mate said there was heavy rust scale, which had to be removed because of the nature of the cargo they were going to load, I would assume that those inaccessible areas high up in the top of the—upper parts of the hold would be at least as bad as the lower parts. That's my personal experience because people—people don't get to those areas very often to maintain them.

* * *

[285] Q. Did you read the master's transcript?

A. What was the name of the master?

Q. Grater.

A. I think I read it a year ago. I have no real recollection of it.

Q. Have you seen any evidence in anything you've looked at that there was rust scale in the upper portions of the No. 6 hold on the *Ikan Selayang*?

A. There is a portion of the chief mate's deposition where he is asked about seeing rust scale in the upper portion of the No. 3 holds and he says, yes, he did.

And then there is some reference to No. 6, but it is rather confused in the transcript, and I don't really understand whether he is referring to No. 6 as well as No. 3 in that particular part of his deposition.

* * *

Excerpts of Trial Testimony of Holly Chapell

[23] Q. What was the purpose for you to journey from here to Brownsville?

A. To make certain that the cargo was well received and that it was unloaded correctly.

* * *

Q. As far as you were concerened, was the cargo unloaded correctly?

A. Yes.

* * *

[24] Q. At that time did the cargo look okay to you?

A. Yes, it did.

* * *

[68] Q. Now, did you at any time ever receive from Demosa a complaint that there were iron or rust particles in the zircon sand?

A. No.

Q. You received word that they were unhappy with the quality of the product that they were producing with the zircon sand, correct?

A. What I got was a copy of their lab report that was in Spanish and made reference to the fact that something, I don't know if it was an—a more advanced product or this product, was darker and yellower than the standard they were using to compare it with.

Q. But they didn't attribute that to anything, did they?

A. I don't remember exactly. I don't think so.

Excerpt of Trial Testimony of David Lapeyre

[168] Q. Now, during your participation on November 6, **[169]** 1991, am I correct that at no time did you observe any contamination of any kind in the sand?

A. No, I did not.

* * *

[Excerpts from Exhib. 2]

[LETTERHEAD OF MID-SHIP MARINE, INC.]

It is this Day Mutually Agreed, between FEDCOM, A DIVISION OF FEDNAV LIMITED, Montreal as Owners, Time-Chartered or Disponent Owners of the Motorship M/V "IKAN SELAYANG" or SUITABLE SUBSTITUTE (See Clauses 43 & 47), of ___ Built ___ at _____, of _____ Tons Net Register, Classed Highest at Lloyd's or Equivalent now expected load ready in accordance with Cls. 43 & 47, and SOGEM AFRIMET, INC., New York, Charterers.

1. That the said Steamship being tight, staunch and strong, and in every way fitted for the voyage, with liberty to take outward cargo for Owner's benefit, shall with all convenient speed sail and proceed to one safe berth BRISBANE, QUEENSLAND, AUSTRALIA, and lie always safely afloat, and there load a part cargo of MINERAL SANDS IN BULK (ZIRCON), Minimum 3,500 Metric Tons/Maximum 4,200 Metric Tons, Quantity in Charterers' option, See Clause 59, not exceeding what she can reasonably stow and carry over and above her cabin, tackle, apparel, provisions, fuel and furniture; which the Charterers bind themselves to ship, and being so loaded the Steamer shall proceed to one safe berth WILMINGTON, NORTH CAROLINA, or in Charterers' option, one safe berth WILMINGTON, NORTH CAROLINA and one safe berth BROWNSVILLE, TEXAS, See Clause 59, and there, always safely afloat, deliver the cargo as customary, at such wharves, docks or other safe places as Charterers or their Agents may direct on arrival, in accordance with Bills of Lading, in consideration whereof Charterers shall pay the Vessel freight as outlined in Clause 61. Freight payable in New York in U.S. Currency and to be 90% prepaid within 5 days after vessel's departure from load port and release of Bills of Lading. Balance of freight is payable after right and true delivery of the cargo and settlement of demurrage/despatch. All freight to be considered earned as cargo is loaded on board and is

non-returnable, ship and/or cargo lost or not lost. Charterers' privilege to deduct commissions from freight payment. Freight payable in U.S. Currency on Bill of Lading quantity via MID-SHIP MARINE, INC. (to Owners' New York nominee).

2. It is also mutually agreed that the Carrier shall not be liable for loss or damage occasioned by causes beyond his control, by the perils of the seas or other waters, by fire from any cause or wheresoever occurring, by barratry of the Master or crew, by enemies, pirates or robbers, by arrest and restraint of Princes, Rulers or People, by explosion, bursting of boilers, breakage of shafts or any latent defect in hull, machinery or appurtenances, by collisions, stranding or other accidents of navigation of whatsoever kind (even when occasioned by negligence, default or error in judgment of the pilot, Master, mariners or other servants of the Ship Owner, not resulting, however, in any case from want of due diligence by the Owners of the Ship or any of them, or by the Ship's Husband or Manager). Charterers also not liable for loss or damage occurring by restraint of Princes, Rulers or People.

* * *

10. Cargo shall be loaded, spout/grab trimmed and discharged at the risk and expense of Charterer by stevedores nominated, employed and paid by Charterer. Shore winchmen at loading and discharging ports to be for account of Charterers. Cargo shall be spout/grab trimmed under the supervision and to the satisfaction of the Master. Charterer, Charterers' Stevedores and Charterers' Agents shall not be responsible for stowage, or any consequences arising therefrom. Any leveling required by Master to be for Owners' risk, time and expense.

* * *

12. Cost of weighing cargo at discharging port or ports to be for account of Charterers and/or their Agents.

13. Any dunnage, excepting shifting boards, required is to be provided by Charterers and Charterers' expense, but Charterers to have use of such dunnage as on board ship, free of charge.

* * *

32. At port of loading, Master to tender notice of readiness and apply for cargo to Charterers' nominee. At port of discharge, Master to tender notice of readiness to Charterers' nominee.

* * *

35. U.S.A. Clause Paramont, New Both to Blame Collision Clause, New Jason Clause and Chamber of Shipping War Risk Clauses 1 and 2 to be incorporated in this Charter Party.

* * *

37. Charterers have the option to arrange for a cargo/draft survey at load port to ascertain cargo on board after completion of loading at Charterers' time and expense.

38. All holds, decks and stanchions are to be swept and cleaned suitable for this cargo before vessel tenders for loading. Owners to have vessel passed by Charterers' representative as clean and ready to load cargo prior to tendering. Vessel's tank tops, manhole covers and shaft tunnel, if any, to be adequately protected by ceiling and sheathing to prevent damage during loading and/or discharging by mechanical trimmers and grabs, also all limbers of bilges to be properly covered and protected to prevent cargo from entering these spaces, unless damaged by stevedores during loading/discharging operations, failing which vessel to be responsible for all consequences including extra labor and extra time used. In the event vessel is fitted with cargo battens and same not removed prior to loading, any extra expenses incurred in loading and/or discharging by reason of cargo battens being fitted to be for Owners' account. (It is understood that the vessel cannot tender Notice of Readiness until passed.)

[Exhib. 3]

[LETTERHEAD OF JAMES, PLUMLEY AND PEARSON]

SURVEY REPORT

18th September, 1991.

This is to certify that the undersigned did, at the request of Consolidated Rutile Ltd., attend on board the m.v. "IKAN SELAYANG" at Hamilton Wharf, Brisbane River on the 17th September, 1991 in order to survey Nos. 3 and 6 Holds for the carriage of Mineral Sands in bulk.

- - - - - And now report - - - - -

T H A T in conjunction with the Chief Officer, I inspected the abovementioned compartments and found them to be clean, dry and suitable.

Wells were made sand tight with hessian and tape.

I now certify that at 0845 hours, local time, on the 17th September 1991, Nos. 3 and 6 Holds were passed as being fit and suitable, in my opinion, for the carriage of Mineral Sands in bulk.

GIVEN at Brisbane this 18th day of September, 1991.

/s/ [ILLEGIBLE]
Marine Surveyor

[Exhib. 70]

UMPIRE AND CONTROL SERVICES INC.

May 28, 1993

The large quantity of rust/scale debris isolated from the sand and submitted to us as "Rust Sifted from Random Bucket of Sand" suggested the possibility that identification of this debris as from a shipboard source would be possible if evidence of sea water elements could be found. The leach tests conducted and the results presented in Table VII show that the sand and the rust contaminant contain only traces of chloride and have critical ratios of sea water elements which correlate poorly with the composition of average sea water. These results obviously do not prove a shipboard origin.

[Exhib. K3]

TO : FEDCOM MTL

FM : MASTER IKANSELAYANG

16/8-91

IRT + RL/MGB – 'I SELAYANG' WITH LATEST PROPOSED STW PLAN MIN SANDS NOW TO BE IN NMBRS 1 4 AND 6 — NMBR 6 CONDITN NOT SO GOOD BUT MSTR REALISED THIS N WILL DO BEST TO PREPARE

B RGDS

Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

No. 97-968

In The

Supreme Court of the United States

October Term, 1997

M/V IKAN SELAYANG, her engines, boilers, etc. and FEDNAV LIMITED,

Petitioners,

vs.

SOGEM-AFRIMET, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN T. LILLIS, JR.
Counsel of Record
DONALD M. KENNEDY
THOMAS C. MURPHY
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13 pp

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent Sogem-Afrimet, Inc. is a wholly owned subsidiary of Sogem-Afrimet S.A. Sogem-Afrimet S.A. is a privately held Belgian corporation. There are no nonwholly owned subsidiaries of Sogem-Afrimet, Inc.

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STATEMENT OF THE CASE

In a case decided under the United States Carriage of Goods by Sea Act of 1936[1] ("COGSA"), Fednav Limited and the M/V IKAN SELAYANG, as Carriers, were found liable for rust contamination of a cargo of premium grade zircon sand owned by Sogem-Afrimet, Inc. The zircon sand cargo was carried from Australia to Texas aboard the M/V IKAN SELAYANG. The United States District Court for the Southern District of New York[2] awarded damages of $270,161.49 in favor of Sogem-Afrimet and against Fednav Limited and the IKAN SELAYANG[3]. The Second Circuit United States Court of Appeals affirmed the District Court's judgment by Summary Order.

Fednav Limited and the M/V IKAN SELAYANG have petitioned for a Writ of Certiorari to the United States Supreme Court, alleging a conflict between Courts in the Second, Fifth and Ninth Circuits in the application of COGSA. Petition at 1.

Sogem-Afrimet, Inc. contends that there is neither a conflict between Circuits nor any other compelling reason for review by this Honorable Court. Sogem-Afrimet, Inc. respectfully submits the within brief in opposition to the Petition as provided by Rule 15 of the Rules of the Supreme Court.

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1. 46 U.S.C. § 1300, *et seq.*

2. Honorable Bernard Newman, Senior Judge of the United States Court of International Trade, sitting by designation.

3. *Sogem-Afrimet, Inc. v. M/V IKAN SELAYANG, et al.*, 951 F. Supp. 429 (S.D.N.Y. 1996), *aff'd without opinion*, 122 F.3d 1057 (2d Cir. 1997). The text of the Second Circuit's Summary Order appears at 1997 WL 568687 (1997).

STATUTE INVOLVED

The United States Carriage of Goods by Sea Act of 1936 provides in part:

> **§ 1303. Responsibilities and liabilities of carrier and ship**
>
> **Seaworthiness**
>
> (1) The carrier *shall be bound*, before and at the beginning of the voyage, to exercise due diligence to —
>
> * * *
>
> (c) Make the holds . . . and all other parts of the ship in which goods are carried, *fit and safe* for their reception, carriage, and preservation.
>
> * * *

46 U.S.C. § 1303 (1936), Petition at 41a (emphasis added).

REASONS FOR DENYING THE WRIT

I.

THE ALLEGED CONFLICT BETWEEN THE CIRCUITS

The impetus behind the instant Petition is an excerpt from *obiter dicta* in this Honorable Court's decision in *Vimar Seguros y Reaseguros S.A. v. M/V SKY REEFER*, 515 U.S. 528, 539-40 (1995). Petition at 12.

To this the Petition adds a comparison of *Atlas Assurance Co., Ltd. v. Harper, Robinson Ship Co.*, 508 F.2d 1381 (9th Cir. 1975); *Sumitomo Corporation of America v. M/V SIE KIM*, 632 F. Supp. 824 (S.D.N.Y. 1985); *Sigri Carbon Corp. v. Lykes Bros. S.S. Co., Inc.*, 655 F. Supp. 1435 (W.D. Ky. 1987); and *Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 1992 AMC 1217 (S.D.N.Y. 1992) (not officially reported)[4]. Petition at 9-11.

The Petition alleges a material conflict between the aforementioned decisions as to whether, by means of a "Free In-Out" ("FIO") contract term, an ocean carrier may delegate its responsibilities under COGSA § 1303(2) to properly load and stow the cargo. Petition at 10-13. The Petition is incorrect for two reasons.

First, there is no conflict. Courts in the Second, Fifth and Ninth Circuits agree that a carrier may be exonerated under COGSA § 1304(2)(i) for cargo damage caused by a charterer-appointed stevedore. *Atlas*, *supra*, 508 F.2d at 1389; *Sigri*, *supra*, 655 F. Supp. at 1440; *Sumitomo*, *supra*, 632 F. Supp. at 841. Petition at 10-12. These cases all involved a "Free In-Out" ("FIO") contract term, and their holdings were based on an absence of *control* by the carrier over the persons or instrumentality which caused the cargo damage. *Atlas* at 1389; *Sigri* at 1440; *Sumitomo* at 841.

Second, the cases allegedly giving rise to the conflict are materially distinguishable from the case at bar. The decisions cited by petitioner involved cargo damage caused by stevedores appointed by charterers under FIO contract terms. The carriers in *Atlas*, *Sigri* and *Sumitomo* exercised no control over the persons and instrumentalities which caused the cargo damage, and could therefore claim exoneration under COGSA

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4. *rev'd*, 978 F.2d 47 (2d Cir. 1992).

§ 1304(2)(i) ("act or omission of the shipper or owner of the goods, his agent or representative").

The case at hand does not require a balancing of petitioner's COGSA § 1303 duties against their COGSA § 1304 immunities. This case does not involve damage to cargo by respondent-appointed stevedores, or damage to cargo caused by improper loading or stowage.

The decisions cited by petitioner reflect no conflict. Notwithstanding a FIO contract term, a COGSA carrier remains liable for the consequences of its own acts and omissions. *Atlas*, *supra*, 508 F.2d at 1389; *Sigri*, *supra*, 655 F. Supp. at 1438; *Sumitomo*, *supra*, 632 F. Supp. at 837.

II.

THE QUESTION OF DUE DILIGENCE

The sole question presented in this case was and is as follows: Did petitioner exercise the due diligence required by COGSA § 1303 to make the IKAN SELAYANG's Cargo Hold No. 6 fit and safe for respondent's cargo?

"Seaworthiness" under COGSA requires that the ship be "reasonably fit to carry the cargo she has undertaken to transport." *Sumitomo*, *supra*, 632 F. Supp. at 840. Petitioner concedes that it alone had the duty under COGSA § 1303 to use due diligence to make Hold No. 6 fit and safe for respondent's cargo. Petition at 15.

Petitioner's own "Standard Requirements" for the preparation of cargo holds to receive zircon sand stated *inter alia* that "any form of contamination is harmful." District Court's Opinion, Petition at 27a Section C. Their "Standard

Requirements" required that all rust be removed from cargo holds before loading zircon sand. District Court's Opinion, Petition at 11a and 23a.

The Master of the IKAN SELAYANG reported to petitioner that the condition of Hold No. 6, into which respondent's zircon sand was to be loaded, was "not so good." District Court's Opinion, Petition at 11a and 23a. At a port in the Philippines, about twenty shore laborers were put into Hold No. 6 to manually chip and scrape rust from the metal surfaces using sledge hammers, chipping hammers and scrapers. District Court's Opinion, Petition at 11a.

Manual chipping and scraping was only done to those portions of Hold No. 6 which the shore laborers could reach from the floor of the Hold. District Court's Opinion at 11a and 23a. Hold No. 6 was approximately 43 feet deep. District Court's Opinion at 13a. No scaffolding or lifts were used to give the laborers access to the upper portions of Hold No. 6. District Court's Opinion at 11a-12a. As a result, no attempt was made to apply the same chipping and scraping means to the upper portions of Hold No. 6 as were used in the lower reaches of that Hold. District Court's Opinion, Petition at 11a-12a and 23a.

The District Court held that the cause of the cargo contamination was the petitioner's failure to chip and scrape rust from the upper portions of Hold No. 6 as it did in the lower part of the Hold. District Court's Opinion, Petition at 22a-24a. The court held that petitioner failed to exercise the due diligence required by COGSA § 1303. District Court's Opinion, Petition at 28a.

III.

THE CARRIER'S COGSA DUTIES CANNOT BE DELEGATED

Petitioner notes that Mr. Pearson, an independent surveyor appointed by the shipper of the zircon sand, inspected Hold No. 6 prior to loading the cargo and found Hold No. 6 fit to carry zircon sand. Petition at 5. Petitioner argues that its obligation to exercise due diligence to make Hold No. 6 fit and safe was fully satisfied when Mr. Pearson approved the hold. This argument is without merit, and was accordingly rejected by the trial court. District Court's Opinion, Petition at 28a-30a.

Petitioner's obligation to use due diligence to make the cargo hold fit and safe for respondent's cargo could not be delegated to Pearson. *Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 978 F.2d 47, 50 (2d Cir. 1992); *Nichimen Co., Inc. v. M/V FARLAND*, 462 F.2d 319, 332 (2d Cir. 1972).

Pearson's opinion as to the condition of Hold No. 6 did not lessen petitioner's responsibility for the consequences of its failure to properly chip and scrape the entire Hold. *GTS Industries S.A. v. S/S HAVTJELD*, 887 F. Supp. 531, 538 (S.D.N.Y. 1994), *aff'd*, 68 F.3d 1531, 1536 (2d Cir. 1995); *Blommer Chocolate Co. v. Nosira Sharon Ltd.*, 776 F. Supp. 760, 776 (S.D.N.Y. 1991), *aff'd without opinion*, 963 F.2d 1552 (2d Cir. 1992).

Petitioner further argues that Mr. Pearson's approval of the condition of Hold No. 6 was the proximate cause of respondent's cargo damage, and was thus an "act or omission of the shipper or owner of the goods, his agent or representative" which would exonerate petitioner under COGSA § 1304(2)(i). Petition at 14-16.

In the case at bar, petitioner had *exclusive responsibility* and exercised *exclusive control* over the cleaning and preparation of Hold No. 6. The decision to employ shore workers with sledge hammers, chipping hammers and scrapers in the lower portion of Hold No. 6 was petitioner's. The decision not to apply the same rust-removal efforts to the upper parts of the Hold was made only by the petitioner.

Mr. Pearson had neither responsibility for, nor any involvement in the preparation of Hold No. 6 to load the zircon sand cargo. Mr. Pearson did not cause rust to fall from the upper reacnes of Hold No. 6 to contaminate respondent's cargo. Mr. Pearson was not a cause in fact or in law of the cargo contamination. The District Court found that the sole factual and proximate cause of the cargo damage was petitioner's decision to do only half the job needed to properly prepare Hold No. 6. This was affirmed by the Second Circuit on the District Court's findings. Summary Order, Petition at 3a. It is respectfully submitted that this finding should not properly be the subject of further review by this Honorable Court.

CONCLUSION

Wherefore respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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